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A TREATISE

ON THE

LAW OF MORTGAGES

OF

REAL PROPERTY.

BY

LEONARD A. JONES,

AUTHOR ALSO OF TREATISES ON "RAILROAD SECURITIES," "CHATTEL MORTGAGES," "LIENS," ETC., ETC.

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I. *Redemption a Necessary Incident of a Mortgage.*

1038. Generally. — As already observed,[1] mortgages of land were at first estates upon condition, and the mortgagor not performing the condition upon the day stipulated lost his estate forever. The idea of redemption after breach of the condition is said to have been introduced into English jurisprudence from the Roman law, under which default in payment of the mortgage debt at the time stipulated did not work a forfeiture of the property, but the creditor thereupon had the authority to sell the property and reimburse himself out of the proceeds. Redemption is purely a creature of courts of equity.[2] Adopting the principle of the civil law, that a mortgage is merely a security for the payment of a debt, they interposed to prevent the hardship and injustice which resulted at common law from the failure of the mortgagor to strictly comply with the conditions of the mortgage. Although the mortgagor had forfeited his estate at law, courts of equity allowed him to redeem his estate within a reasonable time, upon payment of the debt and all proper charges, and this right was called an equity of redemption.

[1] §§ 6–11.

[2] Posten *v.* Miller, 60 Wis. 494.

The owner of the equity of redemption, or the party entitled to redeem, must seek the mortgagee, or the party holding the lien on the land, in the forum where jurisdiction *in personam* can be obtained over such mortgagee or party, without reference to the *situs* of the land. The subject of controversy is immediately the mortgage or trust security from under which the land is sought to be redeemed. That is personal property and follows its owner.[1] It is usual, however, to provide by statute that the suit for redemption shall be brought in the county where the land lies.[2]

1039. An express stipulation not to redeem does not bind the mortgagor. So fully recognized and protected are the equitable rights of the mortgagor, that he is relieved from his own express agreement that upon his failure to pay the mortgage debt at the time stipulated his estate shall be forfeited, such agreement being held utterly void in equity.[3] He cannot, by any form of words, give the mortgage the conditional character it had in the time of Littleton, and which it still has in law; for jurisdiction of the subject will always be taken by a court of chancery, which, looking to the object of the transaction to give security for a debt, will always relieve the mortgagor from the consequences of his failure to perform the condition; and will protect him against his own covenants not to redeem, because his necessities as a debtor may have forced him into this inequitable agreement. It matters not how strongly the parties may express their agreement that there shall be no redemption; the intent being contrary to the rules of equity it cannot be carried into effect.[4]

The right of redemption is the creature of the law. It is not in terms expressed by the parties in the mortgage. But whatever be the form of the transaction, if intended as a security for

[1] Kanawha Coal Co. *v.* Kanawha & Ohio Coal Co. 7 Blatchf. 391, per Blatchford, J.

[2] As in Massachusetts: P. S. 1882, ch. 181, § 31.

[3] § 251; 2 White & Tudor's Lead. Cas. in Eq. 1042. In East India Co. *v.* Atkyns, Comyns, 347, 349, it is said that if a man makes a mortgage and covenants not to bring a bill to redeem, nay, if he goes so far, as in Stisted's case, to take an oath that he will not redeem, yet he shall redeem. See 2 Story's Eq. Juris. § 1019, and cases cited; Peugh *v.* Davis, 96 U. S. 332; Willets *v.* Burgess, 34 Ill. 494; Preschbaker *v.* Feaman, 32 Ill. 475; Wynkoop *v.* Cowing, 21 Ill. 570; Cherry *v.* Bowen, 4 Sneed (Tenn.), 415; Baxter *v.* Child, 39 Me. 110; Henry *v.* Davis, 7 Johns. (N. Y.) Ch. 40; Clark *v.* Henry, 2 Cow. 324; Holridge *v.* Gillespie, 2 Johns. (N. Y.) Ch. 30; Linnell *v.* Lyford, 72 Me. 280, per Appleton, C. J.; Bearss *v.* Ford, 108 Ill. 16; Fields *v.* Helms (Ala.), 3 So. Rep. 106; Parmer *v.* Parmer, 74 Ala. 285.

[4] Bayley *v.* Bailey, 5 Gray (Mass.), 505, 510, per Chief Justice Shaw.

money, it is a mortgage, and the right of redemption attaches to it. Although a deed contain a condition that it shall be absolute and without redemption if a certain sum be not paid by the grantor at a fixed time, and the condition is not punctually performed, there is a right of redemption.[1] "At law," says Lord Eldon,[2] "the mortgagee is under no obligation to reconvey at that particular day; and yet this court says that, though the money is not paid at the time stipulated, if paid with interest at the time a reconveyance is demanded, there shall be a reconveyance, upon this ground: that the contract is in this court considered a mere loan of money secured by a pledge of the estate. But that is a doctrine upon which this court acts against what is the *primâ facie* import of the terms of the agreement itself, which does not import at law that once a mortgage always a mortgage; but equity says that; and the doctrine of this court as to redemption does give countenance to that strong declaration of Lord Thurlow, that the agreement of the parties will not alter it; for I take it to be so in the case of a mortgage that you shall not, by special terms, alter what this court says are the special terms of that contract."

1040. The time of redemption may, by the terms of the mortgage, be postponed for a term of years, or even during the lifetime of the mortgagor or of any other person, and this arrangement is generally for the benefit and convenience of both parties; the mortgagor by this means securing the use of the loan for a fixed period, and the mortgagee obtaining at the same time a continuing security and income for his loan. If the mortgaged property is ultimately and within a reasonable period to be restored to the mortgagor, there is no objection to a mortgage which postpones the payment and redemption for a period of considerable length; and it will be enforced according to its terms. It is only in case of an irredeemable mortgage, or one which is such in effect, that courts of equity will disregard its terms, and annex to it a right of redemption as an indispensable requisite of every mortgage.

How long the right to redeem may be postponed must depend upon the circumstances of the case. It may be postponed so long

[1] See § 241; Rogan *v.* Walker, 1 Wis. 527; Knowlton *v.* Walker, 13 Wis. 264; Orton *v.* Knab, 3 Wis. 576; Plato *v.* Roe, 14 Wis. 453.

[2] In Seton *v.* Slade, 7 Ves. 265, 273; see, also, numerous cases cited in note *a;* Spurgeon *v.* Collier, 1 Eden, 55, 60.

by the terms of the mortgage as to become oppressive to the mortgagor, and thus give equitable ground for relief by an earlier redemption. In one case such relief was given more than twenty-five years after the date of the mortgage, though it had a still longer period to run, the estate having increased greatly in value, and the mortgagee having entered and retained possession of it from the beginning;[1] and in another case it was afforded against a mortgage made by the mortgagor to his solicitor, and in which there was a restraint upon redemption for twenty years, with twelve months' notice after that time.[2]

1041. An agreement to confine the right of redemption to the mortgagor alone, or to any specified persons or class of persons, is a restraint which may be only a little less than providing against any exercise at all of the right, and is relieved against upon the same ground.[3] It is not every such arrangement, however, that is open to objection. Where the mortgagor limited redemption to his own lifetime for the purpose of benefiting the mortgagee, a near relative, by way of settlement, and reserved to himself the right to redeem at any time during his own life, the mortgage was upheld.[4] In like manner a stipulation in the mortgage limiting the time within which redemption may be had does not affect the right to redeem.[5]

1042. Any arrangement which is merely an evasion of the equitable rule that every mortgage is redeemable, or which is designed to enable the mortgagee to wrest the property from the mortgagor, is open to the same objection;[6] as, for instance, an agreement not upon any event or condition to sue for redemption or for the discharge of the mortgage; or an arrangement by which the equity of redemption is conveyed absolutely to the mortgagee,

[1] Talbot *v.* Braddill, 1 Vern. 183, 394.

[2] Cowdry *v.* Day, 1 Gif. 316.

[3] Howard *v.* Harris, 1 Vern. 33; Newcomb *v.* Bonham, 1 Vern. 8; Freem. Ch. 67; Spurgeon *v.* Collier, 1 Eden, 55.

In Newcomb *v.* Bonham, the Lord Chancellor said it was a general rule, *once a mortgage always a mortgage*, and as the estate was expressly redeemable during the mortgagor's lifetime, it must continue so afterwards. The case of Howard *v.* Harris, *supra*, was as follows: Howard mortgaged land, and the proviso for redemption was: Provided that I myself, or the heirs male of my body, may redeem. (In note to the case it is said there was a covenant that no one else should redeem.) The question was, whether his assignee should redeem it, and it was decided he should.

[4] Bonham *v.* Newcomb, 1 Vern. 8; *S. C.* 2 Vent. 364.

[5] Stover *v.* Bounds, 1 Ohio St. 107.

[6] Vernon *v.* Bethell, 2 Eden, 110; East India Co. *v.* Atkyns, 1 Comyns, 347, 349; Toomes *v.* Conset, 3 Atk. 261; and see Jennings *v.* Ward, 2 Vern. 520; Willett *v.* Winnell, 1 Vern. 488; and see, also, 2 Eq. Cas. Abr. 599.

but without intending an absolute sale of it.[1] The court always looks with disfavor and distrust upon any arrangement by which it is proposed to transfer the equity of redemption absolutely to the mortgagee.[2]

1043. An agreement that if the money be not paid by a certain day, the mortgagee shall have the estate absolutely upon the payment of a further sum, is open to the same objection, and is redeemable notwithstanding.[3] Such an agreement is to be distinguished from one accompanying a transaction which is not a mortgage but an absolute sale, whereby the grantor is allowed to repurchase upon certain terms.[4] If the transaction was really a mortgage under the form of an absolute sale, any agreement respecting it which would be objectionable in case of a formal mortgage is equally objectionable here. But there may be a valid sale with an agreement for repurchase. "That this court," says Lord Cottenham,[5] "will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appears that the parties intended it to be a mortgage, is no doubt true; but it is equally clear that if the parties intended an absolute sale, a contemporaneous agreement for a purchase, not acted upon, will not of itself entitle the vendors to redeem."

1044. Neither is the mortgagee allowed to obtain a collateral advantage under the color of a mortgage, which does not strictly belong to the contract. Of this character is a stipulation that if interest is not paid at the end of the year it shall be converted into principal;[6] an agreement for the payment of a com-

[1] Vernon *v.* Bethell, 2 Eden, 110. Lord Chancellor Northington said: "This court, as a court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them. The present case . . . is not that; but . . . it seems to be very much within the mischief which the rule intended to prevent, of making an undue use of the influence of a mortgagee."

[2] Sheckell *v.* Hopkins, 2 Md. Ch. 89.

[3] Price *v.* Perrie, Freem. Ch. 258; Bowen *v.* Edwards, 1 Ch. R. 222. See *Re* Edward's Estate, 11 Ir. Ch. 367.

[4] §§ **256–279.**

[5] In Williams *v.* Owen, 5 Myl. & Cr. 303; and see, also, Ward *v.* Wolverhampton Water Works Co. L. R. 13 Eq. 243; Davis *v.* Thomas, 1 Russ. & My. 506.

[6] § **650**; Chambers *v.* Goldwin, 9 Ves. 254, 271.

mission upon the amount advanced,[1] or upon the rents collected by the mortgagee,[2] or for management while in possession,[3] or as auctioneer for a sale.[4] "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." [5]

1045. An agreement in the mortgage itself, or executed separately but contemporaneously with the mortgage, that upon default the mortgagor shall forthwith release the equity of redemption, under the rule already stated, is void, and redemption will be allowed notwithstanding.[6] An agreement executed subsequently to the mortgage, by which the forfeiture is to be absolute if the debt is not paid at the day stated, may be void as well.[7] It has sometimes been said that such a contract will not be positively disregarded in a court of equity, though it will be viewed suspiciously and watched narrowly.[8]

But a conveyance after default by the mortgagor to the mortgagee, made for the purpose of saving the expense of foreclosure, is valid; as is also a further agreement that the mortgagor may redeem within two years upon the same terms as if the land had been sold under a foreclosure decree.[9]

1046. Redemption may be had after a release of the equity of redemption to the mortgagee, when it appears that he availed himself of his possession of the property and of the embarrassed condition and physical debility of the mortgagor to obtain the release.[10] Or if it appears that the mortgagor, induced by threats, conveyed the equity of redemption to the mortgagee for a grossly inadequate price.[11] The intention of the parties that the conveyance by the mortgagor should have the effect of barring his equity of redemption should clearly appear.[12] If, however, the release of the equity of redemption was made in good faith without undue

[1] Chapple *v.* Mahon, 5 Ir. Eq. 225.

[2] Leith *v.* Irvine, 1 Myl. & K. 277.

[3] Comyns *v.* Comyns, 5 Ir. Eq. 583.

[4] Broad *v.* Selfe, 11 W. R. (M. R.) 1036; *S. C.* 9 Jur. N. S. 885; Barrett *v.* Hartley, L. R. 2 Eq. 789, 795.

[5] Per Master of the Rolls in Jennings *v.* Ward, 2 Vern. 520.

[6] Clark *v.* Henry, 2 Cow. (N. Y.) 324.

[7] Tennery *v.* Nicholson, 87 Ill. 464; Batty *v.* Snook, 5 Mich. 231. Per Manning, J.: "To allow the equity of redemption to be cut off by a forfeiture of it in a separate contract would be a revival of the common law doctrine, using for that purpose two instruments, instead of one, to effect the object."

[8] Hyndman *v.* Hyndman, 19 Vt. 9; Linnell *v.* Lyford, 72 Me. 280.

[9] Stoutz *v.* Rouse (Ala.), 4 So. Rep. 170.

[10] Thompson *v.* Lee, 31 Ala. 292; and see Russell *v.* Southard, 12 How. 139.

[11] Brown *v.* Gaffney, 28 Ill. 149.

[12] Ennor *v.* Thompson, 46 Ill. 214.

influence, for a new and adequate consideration, it will be sustained.[1] A release having been made for a substantial consideration, parol evidence is not admissible to show that the sole purpose of the release was to enable the releasee to give a perfect title to such portions of the lands as he might be able to sell, applying the proceeds to the credit of the releasor, and that the equity of redemption in the portions not so sold should remain unaffected by the release.[2]

II. *Circumstances affecting Redemption.*

1047. The right of redemption is barred by a foreclosure properly made.[3] Though the mortgagee holds two mortgages upon the premises, the foreclosure of one of them extinguishes the mortgagor's equitable interest.[4] But the right of redemption belonging to every person claiming under the mortgagor, and being an incident to every interest in the land mortgaged, the right cannot be extinguished without due process of law, which shall afford every one having such interest an opportunity of exercising his right to redeem; and consequently the foreclosure bars the rights of redemption of those only who are made parties to the action. As to those having this right, who are not made parties, the proceeding is a nullity.[5]

A purchaser at a sale under a foreclosure suit in equity, to which a junior mortgagee was by oversight not made a party, may maintain a suit against such mortgagee to compel him to reedem within a reasonable time or to be foreclosed. In a recent case in New Jersey it was decreed that if such junior incumbrancer should elect to redeem, he should pay not only the principal and interest of the mortgage foreclosed, but also the amount paid by the purchaser upon any lien prior to such junior

[1] Falis *v.* Conway Mut. F. Ins. Co. 7 Allen (Mass.), 46; Trull *v.* Skinner, 17 Pick. (Mass.), 213; Vennum *v.* Babcock, 13 Iowa, 194; Green *v.* Butler, 26 Cal. 595; Pritchard *v.* Elton, 38 Conn. 434; Wynkoop *v.* Cowing, 21 Ill. 570; Marshall *v.* Stewart, 17 Ohio, 356; Holridge *v.* Gillespie, 2 Johns. (N. Y.) Ch. 30; Remsen *v.* Hay, 2 Edw. (N. Y.) 535; Odell *v.* Montross, 6 Hun (N. Y.), 155; *S. C.* 68 N. Y. 499; Shaw *v.* Walbridge, 33 Ohio St. 1; Linnell *v.* Lyford, 72 Me. 280; Stoutz *v.* Rouse (Ala.), 4 So. Rep. 170.

[2] Swect *v.* Mitchell, 15 Wis. 641.

[3] Weiner *v.* Heintz, 17 Ill. 259; Willis *v.* M'Intosh, Ga. Dec. 162; Stoddard *v.* Forbes, 13 Iowa, 296; Ballinger *v.* Bourland, 87 Ill. 513.

[4] Weiss *v.* Alling, 34 Conn. 60.

[5] Miner *v.* Beekman, 50 N. Y. 337; *S. C.* 14 Abb. Pr. N. S. 1; 42 How. Pr. 33; Murdock *v.* Ford, 17 Ind. 52; Bates *v.* Ruddick, 2 Iowa. 423; Johnson *v.* Harmon, 19 Iowa, 56; Sellwood *v.* Gray, 11 Oreg. 534.

mortgage; and that the junior mortgagee should, upon election to redeem, give notice to that effect within thirty days, whereupon a decree should be entered that an account be stated by a master; but if he should fail or neglect to give such notice of his election within the time prescribed, a decree of strict foreclosure should be entered.[1] By a bill to redeem in such case, the person not made a party cannot obtain a judgment dispossessing the purchaser at the foreclosure sale, for such purchaser at least occupies the place of the mortgagee, against whom no one interested in the equity of redemption can maintain an action at law.[2]

1048. Redemption may be had after foreclosure by any person entitled to it who was not made a party to the suit.[3] This rule has been extended to give the purchaser of the equity from the mortgagor the right to redeem, because not made a party to the suit, even though his deed was not on record at the time of the decree of foreclosure.[4] A purchaser of a part of the mortgaged premises has a right to redeem under like circumstances,[5] and an attaching creditor has the same right.[6]

A wife who owns a part of the mortgaged premises, but was not made a party to the foreclosure suit, is allowed to redeem, although her husband was made a party to the suit, and was foreclosed of all his rights in the remainder of the land.[7]

Not only the purchaser at the foreclosure sale with notice that one interested in the estate was not made a party to the foreclosure suit, but also any grantee of such purchaser, with like notice, takes the title subject to the right of such person to redeem.[8]

A first mortgagee brought a foreclosure suit to which he did not make a second mortgagee a party. Pending this suit the second mortgagee brought a foreclosure suit without making the first mortgagee a party to it. Each suit proceeded to judgment and sale in this order. It was held that the purchaser under the first decree and sale took the entire fee, subject only to the second mortgage, the payment of which having been tendered, the pur-

[1] Parker *v.* Child, 25 N. J. Eq. 41.

[2] Evans *v.* Pike, 118 U. S. 241.

[3] Farwell *v.* Murphy, 2 Wis. 533; Murphy *v.* Farwell, 9 Wis. 102; Pratt *v.* Frear, 13 Wis. 462; Wiley *v.* Ewing, 47 Ala. 418; Hodgen *v.* Guttery, 58 Ill. 431; American Buttonhole Co. *v.* Burlington Mut. Loan Asso. 61 Iowa, 464; Bunce *v.* West, 62 Iowa, 80; Gower *v.* Winchester, 33 Iowa, 303; Smith *v.* Sinclair, 10 Ill. 108; Strang *v.* Allen, 44 Ill. 428; Nesbit *v.* Hanway, 87 Ind. 400.

[4] Hodson *v.* Treat, 7 Wis. 263.

[5] Green *v.* Dixon, 9 Wis. 532.

[6] Chandler *v.* Dyer, 37 Vt. 345.

[7] Green *v.* Dixon, *supra.*

[8] Hoppin *v.* Doty, 22 Wis. 621; Hodson *v.* Treat, *supra.*

chaser at the foreclosure sale under that mortgage was not allowed to redeem.[1] But a prior mortgagee has no right to redeem a subsequent mortgage although he has barred all other interests in the equity of redemption by foreclosure.[2]

One who has obtained an interest in the property pending a foreclosure suit is not generally permitted to redeem.[3]

On a bill to redeem from an irregular and invalid foreclosure, the decree should provide for redemption from an unforeclosed security, and not from a void sale; and in determining the amount to be paid, it is erroneous to make a rest in computing interest at the date of the sale.[4]

1049. The mortgagor may be estopped by his own acts. If the owner of an equity of redemption encourages a person to purchase the mortgage by promising that he would never redeem, a court of equity will not allow him to violate his engagements and redeem from such purchaser, who has made expensive improvements on the land;[5] nor will he be allowed to redeem after having joined the mortgagee in selling the premises at public auction under an engagement to give a title of warranty, and he has received the purchase money from one who purchased in good faith, and made large improvements.[6]

1050. The owner of the equity of redemption may maintain a bill to redeem one only of two mortgages held by the same person as assignee; and the fact that the other mortgage has apparently been fully foreclosed will not prevent a decree in favor of the owner as to the mortgage he seeks to redeem.[7]

But if two mortgages be given to secure the same debt, as part of one and the same transaction, the mortgagor must redeem from both. He has no right to separate the transaction into two parts when it was entire in its origin.[8]

A purchaser at an execution sale of the mortgagor's right in equity having redeemed the mortgage, the mortgagor may redeem from the execution sale within the year allowed for this, by paying the amount required for the redemption of that interest alone, and may afterwards redeem from the mortgage within the time in

[1] Murphy *v.* Farwell, 9 Wis. 102.

[2] Goodman *v.* White, 26 Conn. 317.

[3] Cook *v.* Mancius, 5 Johns. (N. Y.) Ch. 89.

[4] Grover *v.* Fox, 36 Mich. 461.

[5] Fay *v.* Valentine, 12 Pick. (Mass.) 40.

[6] Wright *v.* Whithead, 14 Vt. 268.

[7] Milliken *v.* Bailey, 61 Me. 316.

[8] Stinchfield *v.* Milliken, 71 Me. 567.

which he might have redeemed the estate of the mortgagee had no sale been made.[1]

1051. In several states a period is allowed after a foreclosure sale for redemption. A brief statement of the fact, whether redemption is allowed or not, and of the time allowed after sale, is given in a note below;[2] but a fuller statement of the law in this respect is given in the chapter in which the statutory provisions of the several states in relation to foreclosure and redemption are stated.[3]

This is a right of redemption as distinguished from an equity of redemption.[4] A bill in equity is not generally needed to enforce this right.[5]

As already noticed, the law existing at the time of the execution of a mortgage is that which governs as to its validity.[6] It is equally true that the law existing at the time of the making of the mortgage governs in respect to redemption and foreclosure after a foreclosure sale. If, upon petition of a second mortgagee, the whole estate be sold to discharge the mortgages in the order of their priority, and there was no right of redemption when the first mortgage was given, a third mortgagee cannot redeem, though he might have done so had the second mortgagee merely foreclosed his own mortgage. The third mortgagee cannot complain because he is chargeable with notice of the contents of the

[1] Atkins *v.* Sawyer, 1 Pick. (Mass.) 351, 354.

[2] **Alabama**: For two years after sale. **Arkansas**: None. **California**: For six months by owner. **Colorado**: For six months by owner. **Connecticut**: None. **Delaware**: None. **Florida**: None. **Georgia**: None. **Illinois**: For twelve months by owner. **Indiana**: For one year after sale. **Iowa**: For one year after sale. **Kansas**: None. **Kentucky**: None. **Louisiana**: None. **Maine**: None after sale, but three years after possession taken for foreclosure or first advertisement. **Massachusetts**: None after sale, but three years after possession taken for foreclosure. **Maryland**: None. **Michigan**: None, but no sale can be made within one year after filing the bill to foreclose. **Minnesota**: One year after sale. **Mississippi**: None. **Missouri**: None. **Nebraska**: None. **Nevada**: Six months after sale. **New Hampshire**: One year after entry to foreclose. **New Jersey**: None. **New York**: None. **North Carolina**: None. **Ohio**: None. **Oregon**: Sixty days after sale. **Pennsylvania**: None; but suit by *scire facias* to foreclose cannot be commenced until the lapse of one year after default. **Rhode Island**: None after sale; but three years after possession taken and continued either by peaceable entry or by action. **South Carolina**: None. **Tennessee**: Two years after sale. **Texas**: None. **Vermont**: Time limited by the court, not exceeding one year from judgment. **Virginia**: None. **Washington Territory**: One year. **West Virginia**: None. **Wisconsin**: None.

[3] See chapter xxx.

[4] Mayer *v.* Farmers' Bank, 44 Iowa, 212.

[5] McHugh *v.* Wells, 39 Mich. 175.

[6] § 663.

petition.[1] A statute giving a right of redemption for two years after sale is unconstitutional and void, as impairing the obligation of the contract, when applied to mortgages executed prior to the enactment of the statute.[2] In like manner a law shortening the time of redemption from two years to one year after sale is unconstitutional in respect to mortgages existing at the time it took effect. A redemption must be allowed upon such mortgages for two years, in accordance with the law existing when they were executed.[3]

Redemption may be allowed after the expiration of the statutory period if it appears that the mortgagor understood that the purchaser at the foreclosure sale took the title in order to allow him to redeem, and that therefore he gave up efforts to obtain the money elsewhere.[4]

A mistake by the officer who made the sale, in certifying the time of redemption to be one year instead of two, as allowed by law, does not avoid the foreclosure; but in order to redeem a tender should be made within the two years.[5]

When the holder of the certificate of purchase, after the expiration of the time for redemption, allows the grantee of the equity of redemption to redeem, and indorses and delivers the certificate to him, this is a redemption, and the certificate becomes null and void. It does not amount to a transfer of the certificate, or enable the holder of it to use it as a basis of title.[6] A purchaser of the premises at a sheriff's sale under execution stands in the place of the mortgagor as regards the time within which he may redeem from a subsequent foreclosure sale, and cannot redeem after the time within which the latter may redeem has expired, and during the time beyond that allowed to judgment creditors of the mortgagor for redemption.[7] The right of a second mortgagee to redeem cannot be prejudiced by an extension of the statutory time of redemption by arrangement between the first mortgagee and the mortgagor.[8]

A right of redemption after foreclosure, given by statute in any

[1] Gargan *v.* Grimes, 47 Iowa, 180. See, also, Mayer *v.* Farmers' Bank, 44 Iowa, 212.

[2] Howard *v.* Bugbee, 24 How. 461; Bugbee *v.* Howard, 32 Ala. 713; Goenen *v.* Schroeder, 8 Minn. 387; Heyward *v.* Judd, 4 Ib. 483; Carroll *v.* Rossiter, 10 Ib. 174.

[3] Cargill *v.* Power, 1 Mich. 369.

[4] Newman *v.* Locke (Mich.), 36 N. W. Rep. 166.

[5] Johnstone *v.* Scott, 11 Mich. 232.

[6] Frederick *v.* Ewrig, 82 Ill. 363. See McRoberts *v.* Conover, 71 Ill. 524; Brooks *v.* Keister, 45 Iowa, 303.

[7] McRoberts *v.* Conover, *supra.*

[8] Sager *v.* Tupper, 35 Mich. 134.

state, becomes a rule of property binding upon the courts of the United States sitting in such state; and the rules of practice of such courts must be made to conform to the law of the state so far as may be necessary to give full effect to the right.[1] But although a decree of a court of the United States sitting in Illinois for a foreclosure sale, without providing for a redemption, according to the statute of that state, is erroneous, yet it is not void; and a mortgagor entitled to redeem must exercise his right within a year, or his right will be lost.[2] The defect in such a decree is merely in its failing to provide for a right to redeem. The court having jurisdiction of the cause, its decree is not void, and it cannot be questioned collaterally. The right of redemption exists by force of the statute. The deed was prematurely executed and delivered to the purchaser, but the right to redeem was not thereby impaired. As affecting the sale itself, it would seem that a sale without redemption would insure a better price than a sale with a right to redeem; so that the mortgagor has nothing to complain of in that respect. Had all been in regular form, and a certificate of purchase only given on the sale, the purchaser would, after the lapse of the statutory period, be entitled to a deed, there having been no effort for the exercise of the right of redemption. Now, after the lapse of that time the purchaser having the deed, although it was prematurely executed, the purchaser may hold it, there being no equitable ground for the interposition of a court of equity to set the sale aside.

III. *When Redemption may be made.*

1052. There can be no redemption till the mortgage is due. A mortgage payable at a fixed time cannot be redeemed until that time has arrived;[3] and even if the mortgagor tenders the

[1] Brine *v.* Insurance Co. 96 U. S. 627; *S. C.* 6 Reporter, 33; 7 Am. L. Rec. 85; 2 South. L. J. 185; Orvis *v.* Powell, 98 U. S. 176; *S. C.* 8 Cent. L. J. 74; Swift *v.* Smith, 102 U. S. 442. For a decree giving substantial effect to the equity of redemption secured by statute in Minnesota, see Allis *v.* Insurance Co. 97 U. S. 144; Burley *v.* Flint, 105 U. S. 247; Blair *v.* Chicago & Pacific R. Co. (C. C. Ill.) 12 Fed. Rep. 750; Mason *v.* N. W. Ins. Co. 106 U. S. 163. The Circuit Court of the United States has power, by rule or otherwise, to require a party, exercising the right of redemption given by statute, to pay to the clerk of the court one per cent. on the money received and paid out by him as redemption money. Blair *v.* Chicago & Pacific R. Co. *supra.*

[2] Suitterlin *v.* Conn. Mut. Life Ins. Co. 90 Ill. 483; *S. C.* 11 Chicago L. N. 193.

[3] Brown *v.* Cole, 14 Sim. 427; *S. C.* 14 L. J. N. S. Ch. 167; Burrowes *v.* Molloy, 2 Jo. & Lat. 521; Abbe *v.* Goodwin, 7 Conn. 377. See Moore *v.* Cord, 14 Wis. 213.

interest for the whole period the mortgage has to run, a suit to redeem cannot be maintained against the objection of the mortgagee until the mortgage is due by its terms. The courts cannot substitute another contract for that made by the parties.[1] A mortgage payable on demand, or at or before a day certain, may be redeemed at any time.[2]

But if a bill to redeem be brought before the debt is due, and no objection be taken that the bill is premature, and the debt is overdue when the whole case is before the court for decision upon its merits, the objection may be considered as waived. It may, however, be a cause for denying costs for the complainant.[3]

The right of redemption continues until barred by lapse of time, by strict foreclosure, or by deed given in completion of a foreclosure sale.[4] It is not barred by any proceeding at law other than a foreclosure suit, as, for instance, a judgment for waste against the owner of the equity for cutting trees on the mortgaged land.[5] There is no remedy for obtaining redemption other than a bill in equity.[6] Even in case the mortgage debt has been wholly paid, if the mortgagee claims that something is still due, a bill in equity is the proper remedy.[7] In such a suit he may demand that the mortgage be discharged, but must offer to pay any sum that may be adjudged to be still due.[8] So long as the mortgage remains in force and unsatisfied at law, the mortgagor cannot maintain ejectment against the mortgagee.[9] The mortgagee cannot be compelled to take the mortgaged property at an appraised value.[10] He cannot be compelled to take anything but money in payment, and that only by a bill in equity properly framed for the purpose.[11]

As a general rule, when a suit to redeem by the mortgagor would be barred by the statute of limitations, a suit by any one claiming under him would be barred also.[12]

Redemption is not barred under a decree of foreclosure and sale

[1] Abbe *v.* Goodwin, 7 Conn. 377.

[2] *In re* John & Cherry Streets, 19 Wend. (N. Y.) 659.

[3] Stinchfield *v.* Milliken, 71 Me. 567.

[4] Hull *v.* McCall, 13 Iowa, 467; Weiner *v.* Heintz, 17 Ill. 259; Heimberger *v.* Boyd, 18 Ind. 420.

[5] Paulling *v.* Barron, 32 Ala. 9.

[6] Pearce *v.* Savage, 45 Me. 90; Douglass *v.* Woodworth, 51 Barb. (N. Y.) 79.

[7] Pratt *v.* Skolfield, 45 Me. 386.

[8] Beach *v.* Cooke, 28 N. Y. 508; Hill *v.* Payson, 3 Mass. 559; Parsons *v.* Welles, 17 Mass. 419.

[9] Pell *v.* Ulmar, 18 N. Y. 139; Chase *v.* Peck, 21 N. Y. 581.

[10] Craft *v.* Bullard, 1 Sm. & M. (Miss.) Ch. 366.

[11] Craft *v.* Bullard, *supra.*

[12] Tucker *v.* White, 2 Dev. & B. (N. C.) Eq. 289.

until the sale is consummated by the confirmation of the master's report and the delivery of the deed.[1]

1053. The time of redemption may, by agreement of the parties, be extended beyond the period at which it would otherwise be barred by foreclosure; as by an agreement to allow six months to redeem after the regular time for redemption would expire.[2] If the promise be to reconvey or to allow the premises to be redeemed within a reasonable time, the mortgagor must be ready to tender his money within a reasonable time or he will be allowed no relief.[3] Such a promise made after the time limited for redemption has passed will have no effect unless made on a legal and sufficient consideration.[4] But an agreement made before the time of redemption has expired to allow further time, though made without consideration, cannot be disregarded after the time of redemption has passed, but will be enforced by the court.[5] But if the contract be oral, and moreover be incomplete in a material part, a court of equity will not specifically enforce it; it will merely allow redemption within a reasonable time, if it be shown that the debtor relying upon the agreement refrained from exercising the right of redemption until it had expired.[6] There is nothing in the relation of the parties to prevent their freely contracting with each other, or to prevent the mortgagee or the purchaser at a foreclosure sale from imposing his own terms as a condition of extending the time for redeeming.[7] If the arrangement is such that the foreclosure is opened, as would usually be the case, then the failure of the mortgagor to pay the debt, or to perform his agreement, whatever it may be, strictly within the extended time agreed upon, does not work an absolute forfeiture of his right, but he may still redeem within a reasonable time.[8]

Where a time of redemption is allowed by statute after a sale under a power, payments made after the foreclosure, and received with the clear understanding that the redemption should be completed by payment of the whole sum necessary for that purpose within the year allowed by the statute, are in affirmance and not in avoidance of the sale, and their acceptance does not operate to open the sale and extend the time of redemption.[9]

[1] Brown *v.* Frost, Hoffm. (N. Y.) 41.
[2] Chase *v.* McLellan, 49 Me. 375.
[3] McNew *v.* Booth, 42 Mo. 189.
[4] Smalley *v.* Hickok, 12 Vt. 153.
[5] Davis *v.* Dresback, 81 Ill. 393.
[6] Williams *v.* Stewart, 25 Minn. 516.
[7] Ross *v.* Sutherland, 81 Ill. 275.
[8] Dodge *v.* Brewer, 31 Mich. 227.
[9] Cameron *v.* Adams, 31 Mich. 426.

Moreover, a court of equity has no power to extend the time for redemption on a statutory foreclosure, although redemption within the time allowed for it by statute has been prevented by accident and misfortune, or by unavoidable mental and physical disorder.[1]

1054. Advantage of an irregular foreclosure must be taken within a reasonable time. After a lapse of sixteen years, during which time the mortgagor has had knowledge of the facts, he will not be allowed to redeem.[2] Any long delay in bringing a bill to redeem must be satisfactorily explained, or it will be adjudged too late.[3]

Where a mortgagee, just previous to the completion of a foreclosure by possession, promised the mortgagor that "he would give him some time, but that he must not wait long, as he might take advantage of the mortgage," after the lapse of five years without payment or tender, the right of redemption was held to be no longer remaining.[4] If a mortgagor wishes to take advantage of an irregularity in a foreclosure sale made in a suit in equity, to which he was a party, his remedy is by application to have the sale set aside and a new sale granted: he has no power to redeem, although the mortgagee was the purchaser at the sale.[5]

The mortgagor's right to redeem is unaffected by an entry to foreclose made by the heirs of the mortgagee and possession thereunder for more than three years; and the mortgagor may, on a bill in equity against them and an administrator of the mortgagee's estate, redeem the land from the mortgage, and compel the heirs at law to account for the rents and profits to the administrator, to be applied by him on the mortgage debt.[6]

IV. *Who may redeem.*

1055. In general any party in interest may redeem. To sustain a bill to redeem, the plaintiff must have either the mortgagor's title or some subsisting interest under it.[7] It is not neces-

[1] Cameron *v.* Adams, 31 Mich. 426. Mr. Justice Campbell said: "Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute. The parties have a right to stand upon the terms of the law."

[2] Bergen *v.* Bennett, 1 Caines (N. Y.) Cas. 1; Mulvey *v.* Gibbons, 87 Ill. 367.

[3] Askew *v.* Sanders (Ala.), 4 So. Rep. 167; Sanders *v.* Askew, 79 Ala. 433.

[4] Danforth *v.* Roberts, 20 Me. 307.

[5] Brown *v.* Frost, 10 Paige (N. Y.), 243, reversing *S. C.* Hoff. Ch. 41.

[6] Haskins *v.* Hawkes, 108 Mass. 379.

[7] Lomax *v.* Bird, 1 Vern. 182; Grant

sary that he should be interested in the whole of the mortgaged premises; if he owns the equity of redemption of a portion of them only, he may redeem the entire premises.[1] Neither is it necessary to entitle one to redeem that he should have an interest in fee in the premises; the right may be exercised by a tenant for years.[2] In general any one who has an interest in the land, and would be a loser by a foreclosure, is entitled to redeem.[3] His interest must be derived directly or indirectly from or through the right of the mortgagor, so that he is in privity of title with the mortgagor, and an owner of a part of his original equity, or of some interest in it. If he is affected by the mortgage, he may redeem; if he is not affected by it, there is no occasion for his redeeming, and he is not allowed to do so.[4]

The performance of a contract to pasture cattle was secured by a mortgage given to the owner of the cattle by the owner of the rancho where they were pastured. A creditor of the mortgagee levied upon the cattle, and purchased them at the sale under the execution, but there was no seizure or sale of the contract to pasture; therefore it was held that he had no right to redeem the rancho from a prior mortgage.[5]

A bill to redeem, filed by several persons jointly, cannot be maintained if the ground of their joint claim fails, whatever any one of them, claiming title from another source, might be entitled to in a separate proceeding.[6]

1056. A mortgagor who has conveyed the equity of redemption by a warranty deed to a third person cannot maintain a bill to redeem;[7] nor can a mortgagor whose right in equity has been sold on execution redeem the land, unless he has first redeemed it from the execution sale within the time allowed, even though the purchaser of the equity does not redeem;[8] but if the

v. Duane, 9 Johns. (N. Y.) 591; Chamberlin *v.* Chamberlin, 44 N. Y. Superior Ct. 116; Boarman *v.* Catlett, 21 Miss. (13 Sm. & M.) 149; Powers *v.* Golden Lumber Co. 43 Mich. 468; Rapier *v.* Gulf City Paper Co. 64 Ala. 330; Butts *v.* Broughton, 72 Ala. 294; Union Mut. L. Ins. Co. *v.* White, 106 Ill. 67.

[1] Boqut *v.* Coburn, 27 Barb. (N. Y.) 230; *In re* Willard, 5 Wend. (N. Y.) 94.

[2] Averill *v.* Taylor, 8 N. Y. 44.

[3] Pearce *v.* Morris, L. R. 5 Ch. App. 227, 229; Boqut *v.* Coburn, *supra;* Scott *v.* Henry, 13 Ark. 112; Platt *v.* Squire, 12 Met. (Mass.) 494; Farnum *v.* Metcalf, 8 Cush. (Mass.) 46.

[4] Moore *v.* Beasom, 44 N. H. 215; Brewer *v.* Hyndman, 18 N. H. 9; Smith *v.* Austin, 9 Mich. 465; Boarman *v.* Catlett, 21 Miss. (13 S. & M.) 149; Purvis *v.* Brown, 4 Ired. (N. C.) Eq. 413; Selwood *v.* Gray, 11 Oreg. 534.

[5] Abadie *v.* Lobero, 36 Cal. 390.

[6] Bigelow *v.* Booth, 39 Mich. 622.

[7] Phillips *v.* Leavitt, 54 Me. 405; True *v.* Haley, 24 Me. 297.

[8] Ingersoll *v.* Sawyer, 2 Pick. (Mass.) 276. See Peabody *v.* Patten, Ib. 517; Bigelow *v.* Willson, 1 Ib. 485.

purchaser redeems the mortgage within the time allowed the judgment debtor to redeem from the execution sale, the latter may then within that time redeem from the execution sale by paying the amount which may have been satisfied upon the execution by the sale, and may afterwards, at any time before the right to redeem the mortgage is barred by lapse of time, redeem from the mortgage in the same way that he might have redeemed from the original mortgagee had there been no sale on execution.[1] A sale of the equity of redemption upon an execution obtained by the holder of the mortgage for the mortgage debt is void, and the mortgagor may redeem as if no such sale had been made.[2]

1057. A mortgagor whose equity of redemption has been foreclosed by a second mortgagee cannot redeem the first mortgage, because his title is then wholly extinguished and vested in the second mortgagee, who alone is entitled to redeem the first mortgage.[3] But if the first mortgagee forecloses the mortgage without making the second mortgagee a party to the proceeding, the second mortgagee may redeem the first mortgage, and the mortgagor still having the right to redeem the second mortgage may, by so doing, acquire the right of the second mortgagee to redeem the first.[4]

1058. Where a mortgage is conditioned for the support of the mortgagee for life, a grantee of the mortgagor, in order to redeem, must allege and prove that the transfer to him was made with the consent of the mortgagee; though it need not appear that such consent was in writing.[5] The purchaser of an estate subject to such a mortgage is sometimes allowed to redeem on paying a compensation in money for the past neglect of the mortgagor, and an allowance in money for the future.[6]

1059. In general only the mortgagor and those who hold a legal title under him can redeem.[7] An equitable title does not give this right; and therefore one holding a bond for a conveyance of land by the mortgagor cannot maintain a bill to redeem.[8]

[1] Atkins *v.* Sawyer, 1 Pick. (Mass.) 351, 354.

[2] Atkins *v.* Sawyer, *supra;* Washburn *v.* Goodwin, 17 Pick. (Mass.) 137.

[3] Colwell *v.* Warner, 36 Conn. 224.

[4] Goodman *v.* White, 26 Conn. 317.

[5] See §§ **380–395**; Bryant *v.* Jackson, 59 Me. 165; Bryant *v.* Erskine, 55 Me. 153.

[6] See § **395**; Austin *v.* Austin, 9 Vt. 420.

[7] Lomax *v.* Bird, 1 Vern. 182; Grant *v.* Duane, 9 Johns. (N. Y.) 591.

[8] McDougald *v.* Capron, 7 Gray

He may be authorized, however, to use the name of the holder of the legal title to pursue the remedy in his name.

A trustee who holds the legal estate or some interest in it is the proper party to redeem; though the persons beneficially interested may redeem upon the refusal of the trustee to do so.[1]

One who has assigned a mortgage as security for his debt has a right to redeem it on paying the debt. If his assignee has foreclosed the mortgage and purchased the premises, he may still redeem.[2] But the mortgagee may insist that the assignee, who holds the legal title to the property, shall be made a party to the suit;[3] though the suit may be brought in the name of the assignee for the benefit of both.

1060. The grantor by an absolute deed which is merely security for a debt, and therefore a mortgage, has the same right to redeem as a mortgagor in a formal mortgage, so long as the grantee retains the property;[4] and after he has sold it to a *bonâ fide* purchaser from whom redemption cannot be made, he is still liable to account to the grantor for the value of the land at the time it should have been restored to him.[5] Redemption may also be had against the assignee of the grantee, in case he had notice that the delivery of the defeasance was evaded by fraud or otherwise, or that the transaction was in fact a mortgage.[6]

If it appears that the absolute deed was really a sale, or that by agreement of parties, and upon an adequate consideration, what was really a mortgage at first was afterwards changed into a sale, no redemption will be permitted. Evidence of the acts and declarations of the parties is admissible to show the original intention and the subsequent agreement as well.[7] But by some courts it is held in such case that the plaintiff cannot be relieved on the mere proof of the grantee's declarations. There must be proof of fraud, ignorance, or mistake, or of facts inconsistent with the idea of an absolute purchase.[8] It has been shown elsewhere

(Mass.), 278. The statute limits the power of the court to those having a legal right.

[1] Fray *v.* Drew, 11 Jur. N. S. 130.

[2] Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48; Hoyt *v.* Martense, 16 N. Y. 231, reversing *S. C.* 8 How. Pr. 196.

[3] Winterbottom *v.* Tayloe, 2 Drew. 279.

[4] Vanderhaise *v.* Hugues, 13 N. J. Eq. (2 Beas.) 410; Ballard *v.* Jones, 6 Humph. (Tenn.) 455; Still *v.* Buzzell, 60 Vt. 478.

[5] Meehan *v.* Forrester, 52 N. Y. 277.

[6] Daniels *v.* Alvord, 2 Root (Conn.), 196; Belton *v.* Avery, Ib. 279. See, also, Minor *v.* Woodbridge, 2 Root (Conn.), 274.

[7] Watkins *v.* Stockett, 6 Har. & J. (Md.) 435.

[8] Sowell *v.* Barrett, Busb. (N. C.) Eq. 50; Lewis *v.* Owen, 1 Ired. (N. C.) Eq. 290; Allen *v.* McRae, 4 Ib. 325.

that the rule in the several states as to the admission of parol evidence to establish the relation of mortgagor and mortgagee, where the transaction is in the form of an absolute deed, is not uniform;[1] and there is the same want of uniformity as to the admission of parol evidence to show that this relation once established has been given up by a surrender of the right of redemption. In general it may be said that the same degree of evidence is required to establish the surrender of the right that is required in the same state to establish the existence of the right.

A conveyance by a debtor in trust to secure his debt is to be considered a mortgage, to which the right of redemption is incident.[2]

In case of a mortgage in the form of an absolute deed in a suit to redeem, the court will decree a reconveyance of the property upon the payment of the debt.[3] If the conveyance was to secure a general indebtedness, and neither party supposed the land would be redeemed, upon a redemption by an execution creditor of the mortgagor, the mortgagee should be allowed also for the value of improvements made by him.[4] The grantee by an absolute deed, apparently having an absolute title, may convey the property to a *bonâ fide* purchaser, discharged of all right of redemption, and in such case the only remedy of the mortgagor is a personal one against the mortgagee.[5] The estate is discharged of the right to redeem. The length of time that has elapsed after the making of an absolute deed, before any steps are taken towards redeeming, is an important element in determining whether the grantor has the right to redeem.[6]

1061. An assignee of the equity of redemption may generally redeem, whether he holds under a voluntary assignment or by an assignment in law;[7] and it is immaterial that the land is in the possession of a disseisor.[8]

[1] §§ **282–342**.

[2] Chowning *v.* Cox, 1 Rand. (Va.) 306; Pennington *v.* Hanby, 4 Munf. (Va.) 140. See § **332**.

[3] Sherwood *v.* Wilson, 2 Sweeny (N. Y.), 684; Skinner *v.* Miller, 5 Litt. (Ky.) 84; Thompson *v.* Campbell, 6 T. B. Mon. (Ky.) 120. As to form of decree, see L. R. 5 Ch. App. 229.

[4] Blair *v.* Chamblin, 39 Ill. 521.

[5] Whittick *v.* Kane, 1 Paige (N. Y.), 202. See §§ **339–342**.

[6] Mellish *v.* Robertson, 25 Vt. 603. See § **330**.

[7] Thorne *v.* Thorne, 1 Vern. 182; White *v.* Bond, 16 Mass. 400; Dunlap *v.* Wilson, 32 Ill. 517; Scott *v.* Henry, 13 Ark. 112. The redemption of a homestead by an assignee in bankruptcy does not enure to the benefit of the bankrupt. Swenson *v.* Halberg (C. C. Minn. 1880), 1 Fed. Rep. 444.

[8] Wellington *v.* Gale, 13 Mass. 483, 488, per Parker, C. J. Otherwise in **North**

It is not necessary for the assignee to prove that the assignment was made on a valuable consideration. He establishes *primâ facie* his right to redeem by alleging and proving the existence of the mortgage and his ownership of the equity of redemption.[1]

The mortgagor's assignee is under no obligation to redeem from a prior mortgage, unless he has expressly or impliedly agreed to do so. If he has bought subject to the mortgage without assuming it, or if he has purchased the equity of redemption at an execution sale, he has the right, if he chooses to do so, to redeem, but he cannot be compelled to do so.[2]

1062. Upon the death of the mortgagor or owner of the equity of redemption his heir at law or devisee may redeem.[3] If, however, the mortgagor devised the equity of redemption, the devisee is the proper party to redeem,[4] and in that case the heir at law need not be made a party unless he contests the will. During the pendency of a suit to establish the will, an heir cannot make a sale of the equity which will be valid against a devisee, or which will prevent his redeeming after his right under the will is established.[5] A legatee whose legacy is made a charge upon the mortgaged estate may redeem. If land be specifically devised, it is presumed, in the absence of an expressed intention to the contrary, that the land is to be exonerated from all mortgages placed upon it by the testator; and the general rule prevails even when several parcels are devised to different persons, and the testator has directed the removal of the incumbrances as to some of the parcels and not as to others.[6] Consequently in such case the executor should redeem.

The guardian of an infant heir may redeem, and so may the guardian of an insane person.[7]

1063. A part-owner or tenant in common of an equity of redemption may redeem,[8] but he cannot require other part-owners

Carolina when the bill is against the mortgagor as well as the mortgagee. Medley *v.* Mask, 4 Ired. (N. C.) Eq. 339.

[1] Barnard *v.* Cushman, 35 Ill. 451.

[2] Rogers *v.* Meyers, 68 Ill. 92.

[3] Pym *v.* Bowreman, 3 Swanst. 241, n.; Zægel *v.* Kuster, 51 Wis. 31; Hunter *v.* Dennis, 112 Ill. 568; Butts *v.* Broughton, 72 Ala. 294; Chew *v.* Hyman, 10 Biss. 240.

[4] Lewis *v.* Nangle, 2 Ves. Sen. 431; Philips *v.* Hele, Ch. R. 190.

[5] Finch *v.* Newnham, 2 Vern. 216.

[6] Richardson *v.* Hall, 124 Mass. 228.

[7] Powell Mort. 285 *a*, note; Pardee *v.* Van Anken, 3 Barb. (N. Y.) 534.

[8] Howard *v.* Harris, 1 Vern. 33; Pearce *v.* Morris, L. R. 5 Ch. App. 227; Taylor *v.* Porter, 7 Mass. 355.

to join with him in redeeming from the mortgage.[1] If he elects to redeem, he must pay the whole amount due on the mortgage, and hold it to his own use, unless the other part-owners come in and pay their proper contributory shares.[2] Nor does it make any difference that the holder of the mortgage is also a part-owner of the equity of redemption in common with the mortgagor. Such mortgagee is not bound to receive a part of the mortgage debt, and he may wholly decline paying anything toward the redemption; though he may, like any part-owner, at his election, contribute to the payment of the redemption money and share the benefits of the payment.[3]

A mortgage of a railroad company covering the whole line of its road lying in two states may be redeemed by a purchaser upon execution of the equity of redemption of the part of the road situate in one state.[4]

One tenant in common of an equity of redemption may redeem in order to protect his own interest;[5] but by so doing he is not entitled to the whole property to the exclusion of his co-tenant. The redemption by one enures to the benefit of the other so far as to save a forfeiture. The co-tenant may be compelled to pay his proportion of the debt. The tenant who redeems becomes subrogated to the right of the mortgagee, and if his co-tenant does not pay his share, he may be foreclosed of his right to redeem. The tenant in possession, and in receipt of the whole of the rents, is subject to account with his co-tenant.[6] But neither has an equitable right to redeem the whole and keep the other from sharing in the redemption.[7]

In like manner where land is conveyed to two persons, one of whom pays his half of the purchase money, and joins with his co-tenant in a mortgage of the whole estate to secure the payment of the other half, and afterwards releases his interest to the mort-

[1] *Ex parte* Willard, 5 Wend. (N. Y.) 94; Boqut *v.* Coburn, 27 Barb. (N. Y.) 230; Hubbard *v.* Ascutney Mill Dam Co. 20 Vt. 402; Gibson *v.* Crehore, 5 Pick. (Mass.) 146.

[2] Taylor *v.* Porter, 7 Mass. 355; Calkins *v.* Munsel, 2 Root (Conn.), 333; Lyon *v.* Robbins, 45 Conn. 513.

[3] Merritt *v.* Hosmer, 11 Gray (Mass.), 276; Lyon *v.* Robbins, 45 Conn. 513.

[4] Wood *v.* Goodwin, 49 Me. 260.

[5] Wynne *v.* Styan, 2 Ph. 303, 306.

[6] Bentley *v.* Bates, 4 Y. & C. Exch. 182; Gibson *v.* Crehore, 5 Pick. (Mass.) 146, 152; Young *v.* Williams, 17 Conn. 393; Lyon *v.* Robbins, *supra;* Kingsbury *v.* Buckner, 70 Ill. 514; McLaughlin *v.* Curtis, 27 Wis. 644; Carithers *v.* Stuart, 87 Ind. 424.

[7] Seymour *v.* Davis, 35 Conn. 264.

gagee, his co-tenant cannot redeem without paying the whole amount of the mortgage.[1]

Neither can one tenant in common redeem his share only of the estate, as this would be in violation of the principle that a mortgage must be wholly redeemed or not at all;[2] and a partition of the estate with his co-tenant, unless consented to by the mortgagee, does not affect him, and his consent cannot be demanded.[3]

1064. A subsequent mortgagee may redeem from a prior mortgagee at any time after the maturity of the prior mortgage;[4] but if he brings a bill to redeem within the time limited by statute and fails to prosecute it, the owner of the equity of redemption cannot, after that time has expired, maintain a bill to be let in to prosecute the bill to redeem brought by such mortgagee. The junior mortgagee is under no obligation to redeem the prior mortgage, or to prosecute a suit for the purpose, or to do any act to prevent the first mortgagee from foreclosing.[5]

The language of most of the cases is broad enough to establish the doctrine that a junior mortgagee, simply as such and under all circumstances, has the absolute right to pay off or redeem from a senior mortgage past due. But it is intimated in a few cases that such a right may not exist when the senior mortgagee desires to hold his mortgage as an investment, and does not seek or threaten to enforce its collection. In such case the junior mortgagee may be in no danger of loss or embarrassment, and thus may not have any equitable right to disturb or interfere with the senior mortgage to which he is not a party, and for the payment of which he is in no way liable.[6] This question would rarely

[1] Crafts *v.* Crafts, 13 Gray (Mass.), 360; Laylin *v.* Knox, 41 Mich. 40.

[2] Powell Mort. 342 *a*, note.

[3] Watkins *v.* Williams, 3 Mac. & G. 622; *S. C.* 16 Jur. 181. See § 706.

[4] Bigelow *v.* Willson, 1 Pick. (Mass.) 493; Haines *v.* Beach, 3 Johns. (N. Y.) Ch. 459, 460; Pardee *v.* Van Anken, 3 Barb. (N. Y.) 534; Jenkins *v.* Continental Ins. Co. 12 How. (N. Y.) Pr. 66; Frost *v.* Yonkers Savings Bank, 70 N. Y. 553; Dings *v.* Parshall, 7 Hun (N. Y.), 522; Scott *v.* Henry, 13 Ark. 112; Kimmell *v.* Willard, 1 Dougl. (Mich.) 217; Sager *v.* Tupper, 35 Mich. 134; Hill *v.* White, 1 N. J. Eq. (Sax.) 435; Wiley *v.* Ewing, 47 Ala. 418; Morse *v.* Smith, 83 Ill. 396; Lamb *v.* Jeffrey, 41 Mich. 719; Spurgin *v.* Adamson, 62 Iowa, 661.

In **South Carolina** it is provided by statute that subsequent mortgagees, although they have not recorded their mortgages, may redeem prior mortgages; but that any person who shall mortgage the same lands a second time while the former mortgage is in force and not discharged, shall have no power or liberty of redemption, in equity or otherwise. R. S. 1873, p. 424.

[5] McIntier *v.* Shaw, 6 Allen (Mass.), 83.

[6] Frost *v.* Yonkers Savings Bank, 70

arise, because generally if the property is ample to satisfy the junior mortgagee he will foreclose his mortgage instead of making a further investment in the first mortgage. If the holder of the first mortgage is seeking to enforce his security, there can be no question of the right of the holder of the junior mortgage to redeem.[1]

This right of a junior mortgagee to redeem is a common law right, and is entirely independent of a right of redemption given to creditors and limited to a specified time. It applies to deeds of trust to secure the payment of debts as well as to mortgages proper.[2] The junior mortgagee may redeem although his mortgage be of an estate subject to a homestead right, and therefore only a reversionary interest after the expiration of that right.[3] He may redeem although the prior mortgagee has since the making of the second mortgage obtained a conveyance of the mortgagor's equity of redemption.[4]

As between several persons entitled to redeem, redemption will be decreed according to the priority of the claimants.[5]

A subsequent mortgagee, who has assigned his mortgage as collateral security for a debt of his own, may redeem the mortgaged premises from a sale under a prior mortgage; and his redemption enures to the benefit of his assignee. He has such an interest in the property as, with the consent of the holder of the certificate of foreclosure sale, gives him the right to redeem in order to protect that claim.[6]

Where a third mortgagee forecloses his mortgage and bids in the property at the sale, and then redeems from a first mortgagee who also holds the second mortgage, and had foreclosed under the first mortgage and had bid in the property at the sale, the third mortgagee redeems, not as a junior creditor, but as owner, standing in the shoes of the mortgagor; and his redemption does not cut out the second mortgage, but this, if not redeemed, is advanced to the rank of a first lien.[7]

N. Y. 553, 557, per Earl, J.; and to like effect see Bigelow *v.* Cassedy, 26 N. J. Eq. 557, 562, per Van Syckel, J.

[1] Frost *v.* Yonkers Savings Bank, *supra;* Ellsworth *v.* Lockwood, 42 N. Y. 89; Norton *v.* Warner, 3 Edw. (N. Y.) Ch. 106.

[2] Wiley *v.* Ewing, 47 Ala. 418; Beach *v.* Shaw, 57 Ill. 17; Hodgen *v.* Guttery, 58 Ill. 431.

[3] Smith *v.* Provin, 4 Allen (Mass.), 516.

[4] Rogers *v.* Herron, 92 Ill. 583.

[5] Moore *v.* Beasom, 44 N. H. 215; Brewer *v.* Hyndman, 18 N. H. 9.

[6] Manning *v.* Markel, 19 Iowa, 103.

[7] Dickerman *v.* Lust, 66 Iowa, 444.

1065. A tenant for life,[1] or a tenant in tail,[2] may redeem; as may also a remainder-man or reversioner, though the life tenant is entitled to the first option,[3] and by taking an assignment of the mortgage himself may prevent a redemption by the remainder-man;[4] but he cannot compel the remainder-man to redeem him. So, also, one who has a life estate in remainder, or other contingent interest, may redeem.[5]

1066. A tenant for years may redeem,[6] although his lease being made after the mortgage, and good against the mortgagor, is not good against the mortgagee;[7] and although the lessor, being also the mortgagor, has released his equity of redemption to the holder of the mortgage.[8]

A lessee of the mortgagor having a lease valid against him, though not binding upon the mortgagee for the reason that it was made after the mortgage, has a redeemable interest,[9] and it does not matter that the leasehold premises are only a part of the mortgaged estate.[10]

It has been held, also, that a person in possession of the land under a verbal contract to buy it may redeem;[11] and a person having only an easement in the land may redeem.[12]

1067. A widow who has joined in a mortgage in release of dower may redeem, for she is entitled to dower as against every person except the mortgagee and those claiming under him.[13] It is only when the mortgage debt is paid, or when the mortgagee does not object, that her dower can be assigned. But she can redeem without a legal assignment of it.[14] If any person claiming under her husband redeems, she may repay her proportion of the

[1] Wicks *v.* Scrivens, 1 John. & H. 215; Aynsly *v.* Reed, 1 Dick. 249; Evans *v.* Jones, Kay, 29; Lamson *v.* Drake, 105 Mass. 564.

[2] Playford *v.* Playford, 4 Hare, 546.

[3] Ravald *v.* Russell, Younge, 9.

[4] Raffety *v.* King, 1 Keen, 601.

[5] Davis *v.* Wetherell, 13 Allen (Mass.), 60; Ravald *v.* Russell, *supra.*

[6] Hamilton *v.* Dobbs, 19 N. J. Eq. 227; Averill *v.* Taylor, 8 N. Y. 44; Bacon *v.* Bowdoin, 22 Pick. (Mass.) 401.

[7] Keech *v.* Hall, 1 Doug. 21.

[8] Bacon *v.* Bowdoin, 2 Met. (Mass.) 591.

[9] Keech *v.* Hall, *supra,* per Lord Mansfield; Averill *v.* Taylor, *supra.*

[10] Averill *v.* Taylor, *supra.*

[11] Lowry *v.* Tew, 3 Barb. (N. Y.) Ch. 407.

[12] Bacon *v.* Bowdoin, 22 Pick. (Mass.) 401, 405; *S. C.* 2 Met. 591. See, however, § **1059**, and McDougald *v.* Capron, 7 Gray (Mass.), 278.

[13] Opdyke *v.* Bartles, 11 N. J. Eq. (3 Stockt.) 133; McArthur *v.* Franklin, 16 Ohio St. 193; Denton *v.* Nanny, 8 Barb. (N. Y.) 618; Trenholm *v.* Wilson, 13 S. C. 174; Butts *v.* Broughton, 72 Ala. 294; Posten *v.* Miller, 60 Wis. 494.

[14] Henry's case, 4 Cush. (Mass.) 257; Eaton *v.* Simonds, 14 Pick. (Mass.) 98; Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Peabody *v.* Patten, 2 Ib. 517, 519.

amount so paid, and have her dower in the whole estate. But if she herself redeems from the mortgagee, or from his assignee, she must pay the whole amount due on the mortgage.[1] She has an undoubted right to do this although she has released her dower in the mortgage.[2] And even a wife having only an inchoate right of dower may redeem land from a mortgage in which she has joined with her husband to release dower.[3] A foreclosure of the mortgage in the lifetime of the husband, by a suit in equity to which she was not made a party, does not cut off her right of redemption;[4] though when the foreclosure is by a writ of entry, or by *scire facias*, it is not necessary to join the wife as a party in order to bar her right of redemption.[5] A widow in bringing a bill in equity to redeem should show that she has no remedy in law to recover her dower; and should therefore set forth that her husband was seised during coverture of only an equity of redemption, or that if he was seised of the legal estate she joined him in the mortgage.[6]

Under a statute making it the duty of an administrator to pay liens and mortgages upon the estate of the deceased in preference to his general debts, if the administrator, having in his hands sufficient personal property for the purpose, suffers a mortgage to be foreclosed, the widow of the deceased is entitled to recover of the administrator the same proportion of the personal assets she would have had in the land had these assets been applied in discharge of the mortgage. It is immaterial in this respect that the mortgage was given for purchase money and the wife did not join in the mortgage.[7] Her joining in the mortgage operates as a waiver of her right only in favor of the mortgagee; and her right to her share in the real estate is absolute against general creditors of her husband.[8]

[1] **Massachusetts**: Newton *v.* Cook, 4 Gray, 46; Gibson *v.* Crehore, 5 Pick. 146; McCabe *v.* Bellows, 7 Gray, 148; Brown *v.* Lapham, 3 Cush. 551, 554. The decisions in Gibson *v.* Crehore, 5 Pick. 146, 151, and Van Vronker *v.* Eastman, 7 Met. 157, are not in conflict with the doctrine stated, as in those cases the mortgagee did not object to a redemption on the payment of a proportional part.

[2] McCabe *v.* Bellows, 1 Allen (Mass.), 269.

[3] Davis *v.* Wetherell, 13 Allen (Mass.), 60; Lamb *v.* Montague, 112 Mass. 352; Gatewood *v.* Gatewood, 75 Va. 407, quoting text.

[4] Mills *v.* Van Voorhies, 20 N. Y. 412; *S. C.* 10 Abb. Pr. 152; Wheeler *v.* Morris, 2 Bosw. (N. Y.) 524.

[5] Pitts *v.* Aldrich, 11 Allen (Mass.), 39.

[6] Messiter *v.* Wright, 16 Pick. (Mass.) 151; Davis *v.* Wetherell, *supra;* Whitcomb *v.* Sutherland, 18 Ill. 578.

[7] Morgan *v.* Sackett, 57 Ind. 580; 2 R. S. of Ind. 1876, p. 534.

[8] Perry *v.* Borton, 25 Ind. 274; Newcomer *v.* Wallace, 30 Ind. 216; Hunsucker *v.* Smith, 49 Ind. 114.

An estate of homestead entitles the holder of it to redeem.[1]

A tenant by the curtesy may in like manner redeem.

A jointress having a jointure in the whole or any part of the mortgaged estate has a redeemable interest in it.[2] And although she grants a term for years out of her estate for life, so long even as ninety-nine years, "there rests a reversion in her which naturally attracts the redemption."[3]

1068. A surety of a debt secured by a junior mortgage upon payment of the debt is entitled by subrogation to the rights of such mortgagee to redeem from a prior mortgagee.[4] It is his right to avail himself of the security held by the creditor. He thereupon stands in the place of the creditor, and may enforce the security against the property mortgaged and the person primarily liable without any assignment to himself of the mortgage.[5]

1069. A judgment creditor of the mortgagor may redeem.[6] It is not necessary that an execution should first be issued, or the land sold.[7] But a general creditor whose claim is not a charge upon the mortgaged estate has no right of redemption.[8] A judgment creditor has no lien upon his debtor's homestead, and he has therefore no right to redeem the same from a prior mortgage.[9] A mortgagee who has sold the mortgaged premises under a decree of court, having a personal judgment for a deficiency, has been deemed a judgment creditor entitled to redeem from the purchaser at the foreclosure sale, where redemption after such sale is allowed by statute.[10]

[1] Jones *v.* Meredith, Bunb. 346; Casborne *v.* Inglis, 2 Jac. & W. 194; *S. C.* 1 Atk. 603; Stone *v.* Godfrey, 18 Jur. 162; Butts *v.* Broughton, 72 Ala. 294; Kirby *v.* Reese, 69 Ga. 452; Erwin *v.* Blanks, 60 Tex. 583.

[2] Howard *v.* Harris, 1 Vern. 35.

[3] Brend *v.* Brend, 1 Vern. 213.

[4] Wright *v.* Morley, 11 Ves. 12; *Ex parte* Crisp, 1 Atk. 133; Mayhew *v.* Crickett, 2 Swanst. 185; Wade *v.* Coope, 2 Sim. 155; Green *v.* Wynn, L. R. 4 Ch. App. 204; Averill *v.* Taylor, 8 N. Y. 44.

[5] Averill *v.* Taylor, *supra.*

[6] **England**: Mildred *v.* Austin, L. R. 8 Eq. 220; Stonehewer *v.* Thompson, 2 Atk. 440. **New York**: Bank of Niagara *v.* Roosevelt, 9 Cow. 409; *S. C.* Hopk. Ch. 579; Van Buren *v.* Olmstead, 5 Paige, 9; Quin *v.* Brittain, Hoff. Ch. 353; Auger *v.* Winslow, Clarke, 258; Brainard *v.* Cooper, 10 N. Y. 356; Benedict *v.* Gilman, 4 Paige, 58; Dauchy *v.* Bennett, 7 How. Pr 375. **Kentucky**: Hitt *v.* Holliday, 2 Litt. 332. **North Carolina**: Stainback *v.* Geddy, 1 Dev. & B. Eq. 479. **New Jersey**: Mallalieu *v.* Wickham, 42 N. J. Eq. 297; 10 Atl. Rep. 880; Connecticut Mut. L. Ins. Co. *v.* Crawford, 21 Fed. Rep. 281. **Alabama**: Cramer *v.* Watson, 73 Ala. 127.

[7] Cases above, and Brainard *v.* Cooper, *supra.*

[8] Story's Eq. Jur. § 1023; Grant *v.* Duane, 9 Johns. (N. Y.) 591, 611.

[9] Spurgin *v.* Adamson, 62 Iowa, 661.

[10] Greene *v.* Doane, 57 Ind. 186. See § 1334.

The purchaser of an equity of redemption sold on execution has a right to redeem,[1] although the land be in the possession of a disseisor.[2] And so has a judgment creditor to whom the premises have been set off by extent and appraisement, without any deduction on account of the incumbrance.[3] An assignee in bankruptcy,[4] or a trustee appointed by the court or under an assignment from the debtor, may also redeem.[5]

A creditor of the mortgagor having an attachment upon the mortgaged premises may bring a bill in equity to redeem.[6] The mortgagor has a paramount right to redeem, and if he brings a bill to redeem pending a bill by the creditor for the same purpose, he is entitled to a decree for redemption in preference; but he will not be allowed in this manner to unreasonably delay the redemption. A divorced woman who has attached the land of her former husband to secure his payment of alimony to her is entitled, like any attaching creditor, to redeem.[7]

V. *The Sum payable to effect Redemption.*

1070. Payment of the amount due on the mortgage is a necessary condition precedent to redemption.[8] If the holder of the mortgage has paid prior incumbrances for the protection of the estate, the person redeeming is required to add the amounts so paid to the mortgage debt, both because the estate is benefited to that amount, and because the holder of the mortgage by paying such incumbrance is subrogated to the claim, and holds it as a charge upon the property as much as he does the mortgage to which he has direct title. Where a prior mortgage upon payment by a junior mortgagee was discharged of record, and the plaintiff afterward acquired his title while the defendant's mortgage was apparently the only incumbrance, the defendant was allowed the amount so paid by him, inasmuch as the whole amount claimed by him was less than the amount of his own mortgage as it ap-

[1] Coombs *v.* Carr, 55 Ind. 303; Watson *v.* Steele, 78 Ala. 361.

[2] Wellington *v.* Gale, 13 Mass. 483, 488; Atkins *v.* Sawyer, 1 Pick. (Mass.) 351, 354.

[3] White *v.* Bond, 16 Mass. 400.

[4] Lloyd *v.* Hoo Sue, 5 Sawyer, 74.

[5] Francklyn *v.* Fern, Barnard, 30.

[6] Chandler *v.* Dyer, 37 Vt. 345; Bridgeport *v.* Blinn, 43 Conn. 274.

In **New Hampshire** it is provided by statute that an attaching creditor, either before or after execution, may redeem. G. S. ch. 205, §§ 8, 10, 11.

[7] Briggs *v.* Davis, 108 Mass. 322.

[8] Fogal *v.* Pirro, 17 Abb. (N. Y.) Pr. 113; *S. C.* 10 Bosw. 100; Childs *v.* Childs, 10 Ohio St. 339; Cowles *v.* Marble, 37 Mich. 158.

peared of record.[1] But a mortgagor is not required to pay any demands of the mortgagee not embraced in or covered by the mortgage.[2]

If the mortgage be for anything else than the payment of money, the condition of the mortgage, whatever it be, must be fulfilled; and when the condition is fulfilled the mortgagor is entitled to an entry of satisfaction.[3] The mortgagor may also be required to perform a condition not contained in the mortgage; as where the mortgagee conveyed the estate to the mortgagor by a deed imposing a condition, and took back a purchase money mortgage, the mortgagor was not allowed to redeem except upon performing the condition of the mortgage and that of the deed as well.[4]

The sum payable to effect a redemption must include not only the principal debt and interest, but whatever else is by the contract a part of the mortgage debt, as, for instance, an attorney's fee or insurance premiums.[5]

In redeeming from a purchase money mortgage, the mortgagor may make deductions in the mortgage debt for any defects in the title, if it was so agreed between the parties. Where, however, such defects existed, but were cured before the bringing of the suit to redeem, no deductions should be made on account of such defects.[6]

Redemption from a foreclosure sale within the time allowed by statute in several states may be made by paying the purchaser the amount of his bid with interest. This rule applies although the purchaser be the senior mortgagee, and the amount of his bid be less than the amount of the mortgage debt, and redemption is sought by one interested in the equity of redemption who was made a party to the foreclosure suit. Such a redemption is not a redemption from the mortgage, but a redemption from the sale, and is a statutory right.[7]

1071. The mortgagee after default is said to be entitled to notice of payment, on the ground that, redemption being a matter of equity only, the person seeking to redeem should do equity

[1] Davis *v.* Winn, 2 Allen (Mass.), 111.

[2] Parmer *v.* Parmer, 74 Ala. 285.

[3] Goldbeck's App. (Pa.) 8 Atl. Rep. 29.

[4] Stone *v.* Ellis, 9 Cush. (Mass.) 95.

[5] Hosford *v.* Johnson, 74 Ind. 479; Dayton *v.* Dayton (Mich.), 36 N. W. Rep. 209.

[6] Dooley *v.* Potter (Mass.), 15 N. E. Rep. 499.

[7] Day *v.* Cole, 44 Iowa, 452; Tuttle *v.* Dewey, 44 Iowa, 306, distinguished on this ground from Johnson *v.* Harmon, 19 Iowa, 56.

by allowing a reasonable time to the mortgagee to find a new investment for his money. According to the English practice, six months is the proper time of notice; and if the notice be not given, six months' interest is paid in lieu of notice.[1] Although some notice is always proper, there is no established rule or custom regulating it in this country. Of course, if the mortgagee demands his money no notice is necessary; nor is there when he has taken proceedings to enforce his claim, which amount to a demand.[2]

1072. It is a general rule that a mortgage is an entire thing, and must be redeemed entire, and that the mortgagee cannot be compelled to divide his debt and his security.[3] He performs his whole duty when he releases the entire estate upon receiving payment of the whole debt in one payment. The fact that the mortgaged premises have subsequently become divided, and are held in separate parcels by different owners, does not concern him, or put him under any obligation to receive payment of his mortgage in parts from the different owners.[4]

On a bill to redeem, a prior conditional judgment on a writ of entry to foreclose is conclusive evidence of the amount then due on the mortgage.[5]

The rule is the same, although two separate estates are mortgaged by distinct deeds, in case the condition of each is to pay one and the same mortgage debt. A creditor who levies an execution upon one estate becomes entitled to redeem both estates upon payment of the whole mortgage debt; but he cannot be permitted to redeem only the estate levied upon, by paying such proportion of the mortgage debt as that estate bears to the value of the whole mortgaged premises. The debt being one, the mortgage is one also. The unity of the debt makes the equity

[1] Fisher Mort. § 1272, 3d ed.; Browne *v.* Lockhart, 10 Sim. 420, 424; Bartlett *v.* Franklin, 15 W. R. 1077.

[2] Letts *v.* Hutchins, L. R. 13 Eq. 176.

[3] Palk *v.* Clinton, 12 Ves. 48; Cholmondeley *v.* Clinton, 2 Jac. & W. 1, 189; Lamb *v.* Montague, 112 Mass. 352; Merritt *v.* Hosmer, 11 Gray (Mass.), 276; Gliddon *v.* Andrews, 14 Ala. 733; Knowles *v.* Rablin, 20 Iowa, 101; White *v.* Hampton, 13 Iowa, 259; Street *v.* Beal, 16 Iowa, 68; Douglass *v.* Bishop, 27 Iowa, 214; Spurgin *v.* Adamson, 62 Iowa, 661; Lanning *v.* Smith, 1 Pars. (Pa.) Sel. Cas. 13; Meacham *v.* Steele, 93 Ill. 135; Andreas *v.* Hubbard, 50 Conn. 351.

[4] Johnson *v.* Candage, 31 Me. 28; Smith *v.* Kelley, 27 Me. 237; Mullanphy *v.* Simpson, 4 Mo. 319; Lyon *v.* Robbins, 45 Conn. 513; Meacham *v.* Steele, *supra;* Andreas *v.* Hubbard, *supra.* But see Morse *v.* Smith, 83 Ill. 396; Mutual L. Ins. Co. *v.* Easton & Amboy R. R. Co. 38 N. J. Eq. 132.

[5] Stevens *v.* Miner, 5 Gray (Mass.), 429, note; Sparhawk *v.* Wills, 5 Gray (Mass.), 423.

of redemption, though created by two instruments, one and indivisible.[1]

Where two mortgages are made, each upon an undivided half interest, a purchaser who has assumed the payment of both mortgages cannot redeem one without the other. By force of his agreement the two mortgages are consolidated into one.[2]

1073. **The fact that the mortgagee has proved against the insolvent estate** of a deceased mortgagor the mortgage debt, less the full estimated value of the land, and has received a dividend on that amount, does not preclude his claiming the full amount remaining due on the mortgage upon a bill to redeem subsequently brought against him by one who has purchased the equity of redemption from the heirs at law.[3] And the fact that the mortgagor has obtained a discharge, under bankruptcy or insolvency proceedings, from his personal liability for the mortgage debt, does not in any way relieve him from paying the debt in full upon redemption, whatever may be the value of the property.[4]

1074. **When the mortgagee has foreclosed a part of the premises,** redemption may be made of the remaining portion of the premises upon payment of a part of the debt.[5] Land subject to a mortgage was sold with full covenants of warranty in two lots to different persons at different times, and the mortgagee afterwards entered upon both lots for foreclosure, and the foreclosure became absolute as to the lot last sold; whereupon the owner of the lot sold first brought a bill to redeem, and was allowed to do so upon paying the balance due upon the mortgage debt, after deducting the full value of the other lot with the buildings upon it; and it was regarded as immaterial that the buildings were erected after the sale by the mortgagor.[6]

But this rule does not apply where the mortgage has been foreclosed without making all of the several owners of the land parties to the suit, and the mortgagee has purchased at the

[1] Franklin *v.* Gorham, 2 Day (Conn.), 142.

[2] Wells *v.* Tucker, 57 Vt. 223.

[3] Davis *v.* Winn, 2 Allen (Mass.), 111.

[4] Childs *v.* Childs, 10 Ohio St. 339; Kezer *v.* Clifford, 59 N. H. 208.

[5] Dukes *v.* Turner, 44 Iowa, 575, 579; distinguished from Street *v.* Beal, 16 Iowa, 68, where the mortgagee retained all the property.

[6] George *v.* Wood, 11 Allen (Mass.), 41. See Fogal *v.* Pirro, 10 Bosw. (N. Y.) 100. The mortgagee may deduct the costs of the foreclosure suit from the amount to be credited upon the mortgage debt for the value of the land foreclosed, with interest on such costs from the date of the decree of foreclosure. Dooley *v.* Potter (Mass.), 15 N. E. Rep. 499.

sale, because he has by such proceeding and purchase voluntarily severed his right, and obtained an indefeasible title to part of the land and only a defeasible title to another part. The owner not made a party may redeem the portion owned by him on paying a part of the mortgage debt bearing such a proportion to the whole as the value of his land bears to that of the whole mortgaged premises.[1] Two persons owning land in common made a mortgage of it, and one of them afterwards mortgaged his undivided half to another person. The first mortgagee obtained a decree of foreclosure and sale in a suit in which the second mortgagee was not made a party. It was held that the second mortgagee, not being bound by the foreclosure, might redeem an undivided half upon payment of the whole mortgage, less one half the proceeds of the foreclosure sale of the whole land.[2]

1075. One who redeems after a foreclosure sale must pay the whole amount of the mortgage debt, although the land sold for a less sum.[3] The grounds for this rule are clearly stated by Mr. Justice Bradley of the United States Supreme Court: "To redeem property which has been sold under a mortgage for less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be tendered or paid into court. The party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser in equitable proportions, so as to reimburse the latter his purchase money, and pay the former the balance of his debt."[4] In case the mortgagee has bid in the property and afterwards sold portions of it to others, the money paid in redemption should be distributed among the grantees on the basis of the prices paid by them for their purchases, and in the order of the conveyances to them.[5]

A junior incumbrancer who, not having been made a party to a

[1] Green *v.* Dixon, 9 Wis. 532.

[2] Kirkham *v.* Dupont, 14 Cal. 559; and see Frink *v.* Murphy, 21 Cal. 108; Grattan *v.* Wiggins, 23 Cal. 16. See, however, Lauriat *v.* Stratton, 6 Sawyer, 339.

[3] Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Raynor *v.* Selmes, 52 N. Y. 579; Robinson *v.* Ryan, 25 N. Y. 320; Gage *v.* Brewster, 31 N. Y. 218; Bradley *v.* Snyder, 14 Ill. 263; Baker *v.* Pierson, 6 Mich. 522; Johnson *v.* Harmon, 19 Iowa, 56; Martin *v.* Fridley, 23 Minn. 13; Powers *v.* Golden Lumber Co. 43 Mich. 468; Hosford *v.* Johnson, 74 Ind. 479.

[4] Collins *v.* Riggs, 14 Wall. 491.

[5] Davis *v.* Duffie, 18 Abb. (N. Y.) Pr. 360.

foreclosure of a prior mortgage, afterwards redeems, redeems not the premises, strictly speaking, but the prior incumbrance; and he is entitled, not to a conveyance of the premises, but to an assignment of the security.[1] Therefore if the prior mortgagee in such case has become the purchaser at the foreclosure sale, and has thus acquired the equity of redemption of the mortgaged premises, the junior mortgagee upon redeeming is not entitled to a conveyance of the estate, but to an assignment of the prior mortgage; whereupon the prior mortgagee, as owner of the equity of redemption, may if he choose pay the amount due upon the junior mortgage, redeeming that.[2] The decree in such case would be that the junior mortgagee redeem the first mortgage; that the first mortgagee, as owner of the equity of redemption, redeem from the junior mortgage, and if he fail to do so that the premises be sold, and out of the proceeds there be paid, first, the prior mortgage and interest, together with any claim for repairs the first mortgagee may have made upon the premises while in possession; second, the remainder to the payment of the second mortgage and interest upon it, and in case there be a surplus, this to be paid to the first mortgagee as owner of the equity of redemption.[3]

In case a mortgagor or owner of the equity of redemption redeem after a foreclosure sale to which he was not made a party, and the purchaser has entered into possession, the amount to be paid in order to effect a redemption is the amount of the mortgage debt with interest, and the value of improvements made by the purchaser, less the rents and profits received by him.[4]

1076. Under special circumstances redemption of a portion of the mortgaged estate may be made, without paying the mortgage debt, or even contributing towards it; as, for instance, where the owner of such portion held under a warranty deed, and the remaining portion, which was sufficient to satisfy the mortgage debt in full, was owned by the assignee of the mortgage.[5]

Another exception is made in favor of a railway or other corporation to which a right to take land has been granted by a general law or a special act. In such case the corporation, upon taking the land necessary for its right of way, may redeem such part of a

[1] Fell *v.* Brown, 2 Bro. C. C. 276; Pardee *v.* Van Anken, 3 Barb. (N. Y.) 534, 537; Renard *v.* Brown, 7 Neb. 449.

[2] Smith *v.* Shay, 62 Iowa, 119, quoting text.

[3] Renard *v.* Brown, *supra;* Catterlin *v.* Armstrong, 79 Ind. 511.

[4] Barrett *v.* Blackmar, 47 Iowa, 565; Van Duyne *v.* Shann, 39 N. J. Eq. 6; Walton *v.* Bagley, 47 Mich. 385.

[5] Bradley *v.* George, 2 Allen (Mass.) 392.

mortgage as covers the land so taken without paying the whole mortgage debt.[1]

When a mortgagee enters to foreclose for a breach of condition in the non-payment of interest, and the mortgagor brings a bill to redeem, pending which the principal becomes due, he is not entitled to a decree except upon paying the whole sum then due, both principal and interest.[2]

1077. When part only of the debt is due. — When an entry has been made for a breach of condition in the non-payment of one of several sums secured by the mortgage, and the mortgagor wishes to redeem, the mortgagee is not obliged to accept the amounts not yet due; but to avoid the manifest injustice of a foreclosure, the court will make a special decree, upon payment of the sum due, declaring that the proceedings shall stand open, leaving the mortgagee in possession until the further sum shall become due.[3] The mortgagor on paying all that is due, and thus performing the condition so far as he is able, regains the title of the estate. But if all the sums have become payable before the mortgagor brings his bill to redeem, he must pay the whole sum due on the mortgage, and not merely the sum for the non-payment of which the entry was made, before he is entitled to a decree.[4]

The remedy of a mortgagor, or of one claiming under him, entitled to redemption, is by a bill in equity, and cannot be obtained in a suit at law. His estate is only an equitable one.[5] When, therefore, the mortgagor seeks to regain his legal estate and the possession of it in a court of equity, he must do equity to the mortgagee by paying all that is actually due upon the mortgage up to the time of redemption; so that if the mortgagee has entered for a breach of the condition by non-payment of interest, and the principal becomes due pending the mortgagor's bill to redeem, a decree for redemption can only be had upon payment of both principal and interest.[6]

The rule is the same when foreclosure is effected by suit in equity, and a decree is obtained upon one note before the maturity of others. Redemption may be had by the payment of this

[1] Dows *v.* Congdon, 16 How. (N. Y.) Pr. 571; North Hudson County R. R. Co. *v.* Booraem, 28 N. J. Eq. 450.

[2] Adams *v.* Brown, 7 Cush. (Mass.) 220.

[3] Saunders *v.* Frost, 5 Pick. (Mass.) 259.

[4] Mann *v.* Richardson, 21 Pick. (Mass.) 355; Deming *v.* Comings, 11 N. H. 474.

[5] Pearce *v.* Savage, 45 Me. 90; Smith *v.* Anders, 21 Ala. 782.

[6] Adams *v.* Brown, *supra;* Mann *v.* Richardson, *supra.*

note before completion of the sale, leaving the premises subject to the notes not due.[1] When redemption is allowed after sale, and the holder of the first maturing note forecloses, the holder of a note subsequently maturing may redeem from the foreclosure sale, and may himself foreclose for the satisfaction of his own note, and not for the amount paid by him to redeem from the first foreclosure. The holders of the several notes have the same right to redeem that they would have if the notes were secured by separate mortgages.[2] In the same way if the plaintiff has two mortgages upon the same premises, one of which is due and the other not due, redemption may be had upon payment of that only which is due.[3]

1078. **Sometimes it is provided in the mortgage that upon default the whole sum shall become due immediately**, and in such case the rule generally is, that the premises may be foreclosed or sold under a power for the payment of the whole debt, and that the mortgagor will not be allowed to redeem that part of the debt merely upon which the default occurred, and to have the mortgage continue as to the part not due.[4] In Illinois, however, such a provision has been regarded in the nature of a penalty, and relief against it is given in equity upon payment of the instalment due with interest, and costs incurred in any proceeding to sell under a power or in a foreclosure suit.[5]

1079. **If a mortgage be given to secure advances to be made to the mortgagor**, and further advances are made under an oral agreement that the mortgage shall secure them, neither the mortgagor nor any one having no higher equity can redeem without allowing for such advances.[6] A mortgage cannot, by such an agreement, be continued in force as security for a new indebtedness not embraced in the terms of its condition; yet if the mortgagee has advanced money to the mortgagor on the strength of such an agreement, a court of equity will not aid the mortgagor, or any one who has purchased from him with knowledge of the facts, in obtaining a discharge of the mortgage.[7] If a

[1] Hocker *v.* Reas, 18 Cal. 650.

[2] Davis *v.* Langsdale, 41 Ind. 399; State Bank *v.* Tweedy, 8 Blackf. (Ind.) 447; Preston *v.* Hodgen, 50 Ill. 56.

[3] Lamson *v.* Sutherland, 13 Vt. 309.

[4] §§ 76, 1176–1186. Williams *v.* Dickerson, 66 Iowa, 105; Stinson *v.* Pepper, 10 Biss. 107.

[5] Tiernan *v.* Hinman, 16 Ill. 400.

[6] § 360; Stone *v.* Lane, 10 Allen (Mass.), 74; Ogle *v.* Ship, 1 A. K. Marsh. (Ky.) 287; Reed *v.* Lansdale, Hard. (Ky.) 8.

[7] Upton *v.* Nat. Bank, 120 Mass. 153; Joslyn *v.* Wyman, 5 Allen (Mass.), 62; Brown *v.* Gaffney, 32 Ill. 251.

mortgagee holding the title absolutely make unauthorized advances to other persons for such a purpose as cutting timber upon the lands, the mortgagor can redeem without paying them;[1] but if he make further advances to the mortgagor or on his order, these should be allowed him on a bill to redeem.[2]

Where a mortgage is given as security for a loan, and future advances agreed in writing to be made on the performance of certain conditions, it would seem that the mortgage could not be redeemed by payment of the loan actually advanced, so long as the liability, under the agreement to make future advances, is outstanding; and it was so decided in a case where an assignee of the equity of redemption, who sought to redeem the mortgage on payment of the loan without indemnifying against the mortgagee's agreement to make future advances, had acquired his title by a deed in which the land was described as subject to a mortgage of $4,000, the whole amount of the loan and future advances, and the obligation for future advances had been assigned by the mortgagor to a person who claimed that the mortgagee should hold the mortgage undischarged as security for him.[3]

1080. A mortgagee who has paid a prior mortgage or other incumbrance upon the land is entitled to be repaid this amount, as well as his own mortgage, when the mortgagor comes to redeem.[4] In addition to the rights the mortgagee had before, he is subrogated to those which were a charge upon the land in the hands of the prior incumbrancer whom he has paid,[5] whether such incumbrance is a mortgage, a judgment,[6] or a rent-charge.[7] If the outstanding incumbrance embraced not only the land covered by his mortgage, but also other lands, he may recover from the owner of such other lands his proportion of such incumbrance.[8] In the same way the mortgagee is protected in the payment of taxes upon the mortgaged premises, although the mortgage does not provide for the repayment of money paid by the mortgagee

[1] Kelly *v.* Falconer, 45 N. Y. 42.

[2] Williamson *v.* Downs, 34 Miss. 402.

[3] Cox *v.* Hoxie, 115 Mass. 120.

[4] See §§ **357, 714, 1134**; Harper *v.* Ely, 70 Ill. 581; Mosier *v.* Norton, 83 Ill. 519; Page *v.* Foster, 7 N. H. 392; Weld *v.* Sabin, 20 N. H. 533; Arnold *v.* Foot, 7 B. Mon. (Ky.) 66; Grigg *v.* Banks, 59 Ala. 311; Johnson *v.* Payne, 11 Neb. 269; Whittaker *v.* Wright, 35 Ark. 511; Connecticut Mut. L. Ins. Co. *v.* Bulte, 45 Mich. 113; Spurgin *v.* Adamson (Iowa), 30 N. W. Rep. 806; Horrigan *v.* Wellmuth, 77 Mo. 542. By statute in **Indiana**: Acts 1879, ch. 79.

[5] Jenness *v.* Robinson, 10 N. H. 215.

[6] Silver Lake Bank *v.* North, 4 Johns. (N. Y.) Ch. 370.

[7] Robinson *v.* Ryan, 25 N. Y. 320.

[8] Lyman *v.* Little, 15 Vt. 576.

for this purpose;[1] or in the payment of any valid assessment for public improvement.[2] Where the taxes appear to have been duly and legally assessed, and the mortgagee has no knowledge or notice of any defect or illegality in the assessment, the mortgagee is authorized in paying them, and his claim of lien for the payments made cannot be defeated by showing an illegality or irregularity in the assessment.[3]

But although a prior mortgagee upon payment of the taxes due upon the property is subrogated to the lien of the taxes upon the premises as against subsequent incumbrancers, and may have the amount paid by him decreed a lien on the property, he is not subrogated to such lien as against a purchaser at the foreclosure sale, even if such purchaser has agreed to reimburse the amount paid. The mortgagee in such case must depend wholly upon the agreement to repay.[4]

Taxes upon the mortgaged premises paid by a mortgagee very generally, by the terms of the mortgage, would become an additional lien upon the premises under the mortgage. It is provided by statute in some states that the amount so paid by the mortgagee shall constitute a lien and be collectible with the mortgage debt.[5] Such a provision, however, does not entitle the

[1] Kortright *v.* Cady, 23 Barb. (N. Y.) 490; Faure *v.* Winans, Hopk. (N. Y.) 283; Eagle F. Ins. Co. *v.* Pell, 2 Edw. (N. Y.) 631; Robinson *v.* Ryan, 25 N. Y. 320; Strong *v.* Burdick, 52 Iowa, 630; Walton *v.* Bagley, 47 Mich. 385; Broquet *v.* Sterling, 56 Iowa, 357.

As to the personal liability of the owner of the equity of redemption to the mortgagee for taxes which the owner has omitted to pay, and the mortgagee has been obliged to pay in order to save the property from sale, see Hogg *v.* Longstreth, 97 Pa. St. 255.

As to taxes paid after the mortgage is merged in a judgment, see McCrossen *v.* Harris, 35 Kans. 178.

In **Michigan**, however, it is said that money paid by a mortgagee for taxes, to prevent a tax sale, does not constitute a lien apart from the mortgage, but is discharged when the mortgage is satisfied, and there can be no subsequent proceeding to enforce the tax lien as against the mortgagor. Vincent *v.* Moore, 51 Mich. 618.

[2] Dale *v.* M'Evers, 2 Cow. (N. Y.) 118; Brevoort *v.* Randolph, 7 How. (N. Y.) Pr. 398.

[3] Bates *v.* People's, &c. Ass. 42 Ohio St. 655.

[4] Manning *v.* Tuthill, 30 N. J. Eq. 29.

[5] **New York**: St. 1855, ch. 427, § 76; St. 1870, ch. 280; and **Minnesota**: R. S. 1866, ch. 11, § 152. But a mortgagee who, after his foreclosure sale and during the period allowed by statute for redemption after sale, has redeemed the mortgaged premises from a tax sale, is not allowed to tack the sum paid for such redemption to the sum for which the premises were sold at the foreclosure sale, and to require a second mortgagee, seeking to redeem, to pay the amount of the two sums as a prerequisite to his redemption; because redemption is allowed by statute, ch. 81, §§ 13–16, upon payment of the amount for which the premises were sold, except

mortgagee to add to the mortgage debt in this way the amount paid by him in purchasing at a tax sale. Such a purchase is not a payment of taxes, but a purchase of a new lien upon the estate independent of his mortgage.[1] But a mortgagee by paying such taxes does not acquire a right of action against the owner of the equity of redemption as for money paid to his use.[2]

Although a mortgagee has the right to pay taxes and assessments upon the mortgaged property, and collect them as part of the mortgage debt, he cannot, by bidding in the property at a tax sale, deprive the mortgagor of his right to redeem.[3] A mortgagor is also allowed to redeem against a mortgagee who has bought in an outstanding title, under an arrangement with the mortgagor that it is to be held, like the mortgage, subject to redemption, but after acquiring it insists that he purchased it as a stranger.[4]

If one of several mortgagees obtains an annulment of a tax sale of the mortgaged property, this enures to the benefit of all the mortgagees of the property, so far as the vacating of the tax conveyance is concerned, though the mortgagee who obtained such annulment is entitled to be reimbursed out of the mortgaged property.[5]

1081. A subsequent mortgagee may redeem a prior mortgage without paying any other claim, such as the amount of a judgment the prior mortgagee has obtained against the mortgagor.[6] As against a subsequent incumbrancer, any other debt due from the mortgagor, not a charge upon the mortgaged premises, cannot be tacked to the mortgage.[7] Nor can the mortgagee, by purchasing a mortgage upon other land of the mortgagor, compel him to redeem both mortgages, if either.[8] The mortgagee cannot require the payment of any other debt, not a charge upon the premises, as a condition of a redemption.[9]

When a junior mortgagee seeks to redeem a prior mortgage, he

that a creditor, on redeeming, must pay liens prior to his own held by the party from whom redemption is made. Nopson *v.* Horton, 20 Minn. 268.

[1] Williams *v.* Townsend, 31 N. Y. 411.

[2] Raynsford *v.* Phelps, 43 Mich. 342. See, in this connection, Swan *v.* Emerson, 129 Mass. 289.

[3] See § **714**; Williams *v.* Townsend, 31 N. Y. 411.

[4] Moore *v.* Titman, 44 Ill. 367.

[5] Weaver *v.* Alter, 3 Woods, 152.

[6] McKinstry *v.* Mervin, 3 Johns. (N. Y.) Ch. 466; Pardee *v.* Van Anken, 3 Barb. (N. Y.) 534; Jenkins *v.* Continental Ins. Co. 12 How. (N. Y.) Pr. 66.

[7] Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35; Benton *v.* Kent, 61 N. H. 124.

[8] Cleaveland *v.* Clark, Brayt. (Vt.) 165.

[9] Burnet *v.* Denniston, *supra.*

is entitled to a decree upon paying the sum due upon that mortgage, although the holder of the prior mortgage has another claim upon the mortgaged property which is subsequent to the plaintiff's mortgage. The defendant may, however, file a cross-bill to redeem the plaintiff's mortgage, by virtue of the subsequent claim, and in that case the plaintiff would not succeed in redeeming unless he paid both the liens held by the defendant.[1]

Where the holder of a first mortgage also holds a third mortgage upon the same premises as collateral to the first, and sells the property under a foreclosure of the third mortgage, inasmuch as the sale operates to discharge the first mortgage, the holder of the second mortgage can redeem the property only by paying the amount of the first mortgage debt.[2]

1082. The English doctrine of tacking, whereby a junior mortgagee, by purchasing the first mortgage, was allowed to squeeze out an intermediate mortgage or judgment lien, never gained any general recognition in this country, because at an early day registry laws were adopted, and under these priority of registry gave priority of right. Tacking was only allowed when the last mortgagee took his mortgage without notice of the intervening incumbrance. Under laws, therefore, making the recording of the deed notice to all who might come after, there was no chance for the application of this doctrine; and this was so declared in several early cases.[3] In England this unreasonable doctrine, first established through the influence of Sir Matthew Hale,[4] has now at last been abolished.

Neither can the first mortgagee, by purchasing the equity of redemption, squeeze out an intervening mortgage; but the holder of it may still redeem the first mortgage, and compel the holder of the equity of redemption to redeem or be foreclosed.[5]

1083. Consolidating mortgages. — The doctrine in England is, that one holding several mortgages made by the same mortgagor, though of different dates and covering different parcels of land, may consolidate them in one suit for foreclosure, and neither the mortgagor nor a purchaser of the equity of redemption of a parcel covered by one mortgage will be allowed to redeem this

[1] Green *v.* Tanner, 8 Met. (Mass.) 411; Palmer *v.* Fowley, 5 Gray (Mass.), 545, 548.

[2] Strong *v.* Burdick, 52 Iowa, 630.

[3] Grant *v.* U. S. Bank, 1 Caines (N. Y.) Cas. 112 (1804). See § **569**.

[4] Marsh *v.* Lee, 2 Vent. 337; *S. C.* 1 Ch. Cas. 162; and see Brace *v.* Marlborough, 2 P. Wms. 491.

[5] Thompson *v.* Chandler, 7 Me. 377.

parcel without also redeeming all other mortgages by the same mortgagor held by the plaintiff and included in his suit, whether he acquired them before or since the purchase, and whether the purchaser had notice of the existence of the other mortgages or not. A mortgagee of a lot covered by one of such mortgages stands in the same position as regards redemption as a purchaser for value.[1]

In like manner, in a few cases in this country it has been held that a mortgagor going into equity to redeem is bound to do equity, and on that ground to pay another debt unsecured which he owes to the holder of the mortgage.[2] But the prevailing doctrine is, that a mortgagor may always redeem by paying the specific debt secured by the mortgage, together with such prior liens as the mortgagee may have been compelled to pay for the protection of the mortgage.[3]

It is said that when a mortgagor goes into equity to redeem he must do equity, and therefore pay not only the mortgage debt, but as well all other debts due from him to the mortgagee. This principle has sometimes been applied when the mortgagor has sought the recovery of the surplus proceeds of a foreclosure sale of the premises. But where, on the other hand, the mortgagee seeks a foreclosure, the mortgagor is permitted to redeem upon payment of the mortgage debt alone.[4]

1084. Costs of previous foreclosure. — Upon redemption after foreclosure by one having an interest in the estate who was not made a party to the suit, the costs of the previous foreclosure cannot be added to the principal and interest of the mortgage debt in making up the amount to be paid;[5] nor can the attorney's fees of the mortgagee in the foreclosure suit be added.[6]

But expenses necessarily incurred by a mortgagee in redeeming

[1] Beevor *v.* Luck, L. R. 4 Eq. 537; Tassell *v.* Smith, 2 De G. & J. 713; Vint *v.* Padget, Ib. 611; Cummins *v.* Fletcher, L. R. 14 Ch. D. 699; Mills *v.* Jennings, 13 Ib. 639.

[2] Scripture *v.* Johnson, 3 Conn. 211; Powis *v.* Corbet, 3 Atk. 556; Walling *v.* Aikin, 1 McMull. (S. C.) Ch. 1; Bank of S. C. *v.* Rose, 1 Strobh. (S. C.) Eq. 257.

[3] Beck *v.* Ruggles, 6 Abb. (N. Y.) N. C. 69; Kipp *v.* Delamater, 58 How. (N. Y.) Pr. 183.

[4] Anthony *v.* Anthony, 23 Ark. 479.

[5] Gage *v.* Brewster, 31 N. Y. 218, reversing 30 Barb. 387; Moore *v.* Cord, 14 Wis. 213; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Vroom *v.* Ditmas, 4 Ib. 526; Hosford *v.* Johnson, 74 Ind. 479.

[6] Bondurant *v.* Taylor, 3 Gr. (Iowa) 561.

a prior incumbrance upon the property are justly chargeable to the owner of the estate upon redemption.[1]

In redeeming from one whom the mortgagor has induced to purchase the mortgage, upon his promise in writing to pay the whole sum advanced with interest, an assignee of the equity of redemption with notice must pay all that the mortgagor must have paid.[2]

1085. Over-payment to prevent foreclosure. — If a mortgagor is compelled to pay to a mortgagee in possession more than is legally due, in order to redeem and prevent a foreclosure, the payment is such a compulsory one as entitles the mortgagor to recover the amount overpaid in an action for money had and received.[3] In such action the same legal and equitable rules are applied which are applicable to a settlement of the mortgagee's account upon a bill in equity to redeem; and whether the mortgagee's charges are reasonable is not an open question to be left to the jury, but a question of law to be decided by the court, according to the facts and circumstances found by the jury.

In like manner where redemption is allowed for a certain time after a foreclosure sale, the person entitled to redeem may properly pay under protest, in order to save the estate, whatever the officer may demand, though it be too much, and recover the excess of the payment afterwards.[4]

1086. A mortgagee cannot be compelled to assign the mortgage upon receiving payment of it; he can only be required to release or discharge it:[5] much less can a prior mortgagee be compelled to sell and assign his mortgage to a junior mortgagee, when the latter does not offer to pay or redeem the prior mortgage; and the refusal of the latter to assign his mortgage is no evidence of fraud on his part in foreclosing his mortgage.[6] If the person who redeems is interested in only a portion of the property, he becomes in equity an assignee of the mortgage for the purpose of compelling a contribution from those who own the other portions of the equity of redemption without any formal

[1] Miller *v.* Whittier, 36 Me. 577.

[2] Holbrook *v.* Worcester Bank, 2 Curtis, 244.

[3] Close *v.* Phipps, 7 M. & G. 586; Fraser *v.* Pendlebury, 10 W. R. 104; Cazenove *v.* Cutler, 4 Met. (Mass.) 246; and see Farwell *v.* Sturdivant, 37 Me. 308; Windbiel *v.* Carroll, 16 Hun (N. Y.), 101.

[4] McMillan *v.* Richards, 9 Cal. 365.

[5] See § 792; Lamb *v.* Montague, 112 Mass. 352; Lamson *v.* Drake, 105 Mass. 564; Hamilton *v.* Dobbs, 19 N. J. Eq. 227; Bigelow *v.* Cassedy, 26 N. J. Eq. 557; Chedel *v.* Millard, 13 R. I. 461; Gatewood *v.* Gatewood, 75 Va. 407.

[6] Chase *v.* Williams, 74 Mo. 429.

transfer of the mortgage to him. He is subrogated to the rights of the mortgagee by operation of law. Having assumed, for his own protection, more than his share of the common burden, he is fully protected under this settled rule of equity, and without any act on the part of the mortgagee may enforce his equitable rights to contribution against the other parties in interest. He can call upon them to pay their shares of the incumbrance, or to be foreclosed of all right of redemption.[1]

In like manner when a junior mortgagee or other incumbrancer redeems from a prior mortgage, although he has no right to demand a written assignment of the mortgage, he has the right to have the mortgage delivered to him uncancelled, and this in equity is a complete assignment of it. Such redemption puts him in the place of the mortgagee, and gives him all the mortgagee's rights against the mortgagor.[2] He thereupon becomes entitled to hold it as an existing mortgage, until the owner redeems or he himself forecloses it.

The rule is the same whether the redemption take place before any proceedings to foreclose are had, or after foreclosure proceedings have been commenced, but have not terminated in a complete foreclosure by the expiration of the time of redemption.[3]

If there be an exception to this rule, it is in case the party making the payment occupies such a relation to the mortgage or the parties in interest that he is entitled to be substituted in the position of the mortgagee upon paying the mortgage, for such a person may sometimes in equity require an assignment of the mortgage and other securities for his protection and indemnity; though a court of equity will often treat the assignment as made without an actual execution of it.[4]

1087. In New York, however, it is an established doctrine that a mortgagee may be compelled, upon payment of his mortgage, to make an assignment of it when this will afford a more complete protection to the person who has paid the money, and he is not primarily liable to pay it, but is, for instance, a surety or a junior incumbrancer.[5] This right to an assignment rests

[1] Young *v.* Williams, 17 Conn. 393; Averill *v.* Taylor, 8 N. Y. 44; Brainard *v.* Cooper, 10 N. Y. 356; Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35; McLean *v.* Towle, 3 Sandf. (N. Y.) Ch. 117, 119; Powers *v.* Golden Lumber Co. 43 Mich. 468.

[2] Hamilton *v.* Dobbs, 19 N. J. Eq. 227; Dodge *v.* Fuller, 2 Flip. 603.

[3] Dodge *v.* Fuller, *supra.*

[4] Gatewood *v.* Gatewood, 75 Va. 407.

[5] Johnson *v.* Zink, 52 Barb. 396; Pardee *v.* Van Anken, 3 Ib. 534; Tompkins *v.* Seely, 29 Ib. 212; McLean *v.* Tomp-

wholly upon the assumption that the person redeeming cannot otherwise be protected. In other courts protection is given in all cases upon the principle of subrogation by law. The mortgagee is not allowed to discharge the mortgage of record, but is required to deliver it, with the note or bond which accompanies it, to the person redeeming, who may enforce the obligations if necessary in the name of the mortgagee. An assignment of the mortgage and debt assumes a sale of them, which a mortgagee cannot be compelled to make. Subrogation, on the other hand, assumes the payment of the debt by one not liable primarily to pay it; but by paying it the law says that the person making the payment steps into the place and rights of the mortgagee who receives the payment.

To enable a subsequent mortgagee to compel an assignment to himself of a prior mortgage paid by him, it was formerly said that there must be some equitable reason for it, and that the mere fact that he is a subsequent mortgagee does not constitute such equitable reason;[1] but the Court of Appeals in a recent case has decided that a junior mortgagee, upon paying a senior mortgage, may compel an assignment, although he does not occupy the position of a surety.[2]

Application for an assignment may be made in the foreclosure proceedings, if such are pending, accompanied by an offer to pay whatever sum is due upon the mortgage and for costs.[3] If no such suit is pending, and the mortgagee declines a tender of the amount due, accompanied by a demand for an assignment, he may bring a bill to redeem in the usual form, except in asking

kins, 18 Abb. Pr. 24; Jenkins *v.* Continental Ins. Co. 12 How. Pr. 66; Dauchy *v.* Bennett, 7 Ib. 375; Ellsworth *v.* Lockwood, 42 N. Y. 89; Bayles *v.* Husted, 40 Hun (N. Y.), 376; Platt *v.* Brick, 35 Hun (N. Y.), 121. See § 792.

In **Iowa** an assignment may be demanded under Code 1880, § 3323. If the senior mortgage covers a homestead, which is not included in the junior mortgage, the junior mortgagee upon redeeming is entitled only to an assignment of the part not including the homestead. Grant *v.* Parsons, 67 Iowa, 31.

In **Pennsylvania** it is provided that an assignment may be required upon payment in the following cases: 1. Where the lands belong to minors and an assignment is for their interest; 2. Where they are held by will, or for life with remainder over; 3. Where they are held in trust; 4. Where they have descended under the intestate law. The assignment in such cases may be enforced by the Court of Common Pleas sitting as a court of equity. Laws 1885, No. 123.

[1] Frost *v.* Yonkers Savings Bank, 8 Hun (N. Y.), 26; Vandercook *v.* Cohoes Sav. Inst. 5 Hun (N. Y.), 641; Ellsworth *v.* Lockwood, *supra.*

[2] Twombly *v.* Cassidy, 82 N. Y. 155.

[3] Hornby *v.* Cramer, 12 How. (N. Y.) Pr. 490.

for an assignment of the mortgage to himself instead of a discharge of it.[1]

1088. A tender made after breach of the condition, except in those states where the common law doctrine has been changed, does not reinvest the mortgagor with the legal estate;[2] and the effect of it generally is only to allow a suit to be brought for redemption within a certain time as provided by statute in several states, or to throw the costs of the suit upon the mortgagee in case the tender was of a sufficient amount to fully satisfy his claim.[3] Of course the acceptance of the whole sum tendered operates as a waiver of the foreclosure, and a restoration of the mortgagor's title.[4]

A tender, to be good, must be of the whole amount due.[5] It must be made to the mortgagee or his assignee.[6] If an assignment has been made but not recorded, it is the duty of the person who wishes to make a tender to seek out the assignee.[7] But if the mortgagee on inquiry refuses to disclose the name of his assignee, and the mortgagor has no notice of the assignment, he may make a tender to the mortgagee and maintain against him his bill to redeem.[8]

A tender to the legal holder of the mortgage of the whole amount due on it is good, although only a portion of it belongs to him, and the balance to some other person for whom he holds the mortgage in trust.[9]

A tender must be made unconditionally.[10] An offer to pay if the defendant "would reassign and transfer" to him is not sufficient;[11] nor is one conditioned upon the execution of a quitclaim deed in addition to a discharge.[12] As to the place of tender, if no place of payment is mentioned in the mortgage deed, and none has been agreed upon by the parties, the mortgagor must seek the mortgagee and make a personal tender.[13] The mortgagee

[1] See Smith *v.* Green, 1 Coll. 555.

[2] See § **892**; Smith *v.* Anders, 21 Ala. 782; Patchin *v.* Pierce, 12 Wend. (N. Y.) 61.

[3] Lamson *v.* Drake, 105 Mass. 564, 568.

[4] Patchin *v.* Pierce, *supra.*

[5] Graham *v.* Linden, 50 N. Y. 547; Litt. §§ 334, 337. See § **894**.

[6] Dorkray *v.* Noble, 8 Me. 278.

[7] Mitchell *v.* Burnham, 44 Me. 286.

[8] Fritz *v.* Simpson, 34 N. J. Eq. 436; Mitchell *v.* Burnham, *supra.*

[9] Cliff *v.* Wadsworth, 2 Y. & C. C. C. 598; Graham *v.* Linden, 50 N. Y. 547; Lindsay *v.* Matthews, 17 Fla. 575.

[10] Evans *v.* Judkins, 4 Camp. 156; Glasscott *v.* Day, 5 Esp. 48; Cole *v.* Blake, Peake, 179; Loring *v.* Cooke, 3 Pick. (Mass.) 48. See § **900**.

[11] Ferguson *v.* Wagner, 41 Ind. 450; Wendell *v.* New Hampshire Bank, 9 N. H. 404.

[12] Dodge *v.* Brewer, 31 Mich. 227.

[13] See § **897**; Gyles *v.* Hall, 2 P. Wms.

should be sought at his place of business, though under many circumstances a tender at his house is proper.[1]

A tender of bank notes or bills which are not made a legal tender is sufficient, if not objected to on that account;[2] and in like manner a tender of a larger sum than is due, whereby the creditor is obliged to make change or to return a part, is good if no objection is made.[3] The money should be actually produced, for though the creditor may refuse at first, the sight of the money, it is said, may tempt him to take it.[4] But this may be waived by the mortgagee, as by requesting the mortgagor not to trouble himself to go to another part of the house for it;[5] or by refusing to look at it.[6] A tender of money in bags is good, if the money is actually contained in them;[7] and so of notes twisted in a roll.[8] A mistake in the value of a coin included in the tender may be relieved against.[9]

The tender must be made at a proper time. If a certain hour be fixed for the payment of the money, the mortgagor's attendance at any time before the beginning of the next hour is sufficient. In a case where the hour was fixed at three o'clock, and the mortgagor attended before four o'clock to make payment, he was not bound to pay interest afterwards, although the mortgagee had waited from a quarter before three till a quarter after that hour.[10]

If the mortgagor requests the rendering of an account of the amount due, the request must be so made in respect to time and place as to give the mortgagee an opportunity to render an account.[11] A request made upon the mortgagee when absent from home in another town, and a reply by him that he would give all the information in his power if the mortgagor would call upon

378; Sharpnell *v.* Blake, 2 Eq. Cas. Abr. 604.

[1] Manning *v.* Burges, 1 Ch. Cas. 29.

[2] Austen *v.* Dodwell, 1 Eq. Cas. Abr. 318; Lockyer *v.* Jones, Peake, 180, n.; Biddulph *v.* St. John, 2 Sch. & Lef. 521; Fellows *v.* Dow, 58 N. H. 21.

[3] Black *v.* Smith, Peake, 88. See § **901**.

[4] Douglas *v.* Patrick, 3 T. R. 683; Thomas *v.* Evans, 10 East, 101; Dickinson *v.* Shee, 4 Esp. 67.

[5] Douglas *v.* Patrick, *supra;* Harding *v.* Davies, 2 Car. & P. 77.

[6] Fellows *v.* Dow, *supra.*

[7] Wade's case, 5 Rep. 115 *a.* See conflicting case, Sucklinge *v.* Coney, Noy, 74.

[8] Alexander *v.* Brown, 1 Car. & P. 288. For tenders held bad, see Harding *v.* Davies, *supra;* Leatherdale *v.* Sweepstone, 3 Ib. 342; Glasscott *v.* Day, 5 Esp. 48; Thomas *v.* Evans, 10 East, 101.

[9] Abbott *v.* Banfield, 43 N. H. 152.

[10] See § **898**; Knox *v.* Simmons, 4 Bro. C. C. 433.

[11] Willard *v.* Fiske, 2 Pick. (Mass.) 540; Putnam *v.* Putnam, 13 Ib. 129.

him at home, do not amount to a demand for an account and a refusal to render it.[1]

When on the day before the expiration of the time for redeeming land from a mortgage, a person in behalf of the mortgagor called upon the mortgagee and asked him to execute a quitclaim deed and receive the money due on the mortgage, but he declined to do so, and said he wished to see the mortgagor, whom he would meet in two days, and then would take no advantage of the expiration of the time, it was held that the tender was sufficient to entitle the mortgagor to redeem if the tender was made by his authority.[2] Oral authority from the mortgagor, or a subsequent ratification by him, is sufficient.[3]

VI. *Contribution to redeem.*

1089. In general. — When the estates of two persons are subject to a common mortgage, which one of them pays for the benefit of both, he has a right to hold the whole estate thus redeemed until the other party shall pay an equitable proportion of the sum paid to redeem; or the party who has paid the incumbrance may in equity enforce contribution from the other.[4] But to entitle one to contribution from the other, their equities must be equal.[5] If there was any obligation resting upon the person who paid the incumbrance to discharge it as a debt of his own, he can of course claim nothing from the other, although the latter was benefited by the payment; and on the other hand, if it was the duty of the latter to pay the whole incumbrance, the payment of it by the former gives him, not a right to contribution, but a right to hold the mortgage as a subsisting security against the other part owner; in other words, he is subrogated to the position of the mortgagee. The right of subrogation has already been spoken of, and it remains to be considered under what circumstances the right to contribution arises.

The test by which the right to contribution is always determined is found in the inquiry whether the equities of the parties are equal: if they are equal, the right to contribution exists; but if they are not equal, it does not exist. A mortgagor who has

[1] Fay *v.* Valentine, 2 Pick. (Mass.) 546.

[2] Walden *v.* Brown, 12 Gray (Mass.) 102.

[3] Walden *v.* Brown, *supra.*

[4] Chase *v.* Woodbury, 6 Cush. (Mass.) 143; Schœnewald *v.* Dieden, 8 Bradw. (Ill.) 389; Weed *v.* Calkins, 24 Hun (N. Y.), 582.

[5] Weed *v.* Calkins, *supra.*

sold a portion of the land covered by the mortgage by a warranty deed cannot claim contribution of the purchaser, because he is himself liable for the whole debt. Neither can a subsequent purchaser call upon a prior one for contribution, because such subsequent purchaser acquires only the rights the mortgagor then had, and therefore the equities of the two purchasers are not equal.[1]

One tenant in common paying a general incumbrance upon the common estate, for which neither tenant is personally liable, has no claim for contribution against his co-tenant. His only remedy is to pay the incumbrance, and then enforce that by foreclosure against his co-tenant. He cannot compel his co-tenant to redeem his half of the land. The co-tenant has his option whether he will redeem or let his interest go. No personal obligation rests upon him to redeem, or to pay any part of the mortgage debt. The mortgage is a burden upon the land, and its payment not a personal duty; and therefore he may exercise his option whether he will save his interest by paying the debt, or let his interest be foreclosed.[2]

When a mortgage is foreclosed by a suit in equity or an equitable suit under the codes adopted in many states, the equities of purchasers of portions of the mortgaged estate are protected by a direction in the decree of sale that the parcels be sold in the inverse order of alienation.[3] Where the foreclosure is effected in other ways, as, for instance, by sale under a power, by entry and possession, by strict foreclosure, by a writ of entry or other suit at law, the remedy of one whose estate is not primarily liable for the satisfaction of the mortgage is to redeem it, and then enforce it against that part of the mortgaged premises which in equity should bear the burden.[4]

1090. The general rule, therefore, as to contribution is, that where the estates of two or more persons are subject to one common incumbrance, which one pays for the benefit of all, he is entitled to hold the whole estate which he has thus redeemed until the others pay their proportionate and equitable share of the sum so paid for the common benefit of all.[5] But to entitle the several

[1] Kilborn *v.* Robbins, 8 Allen (Mass.), 466; Sanford *v.* Hill, 46 Conn. 42; Henderson *v.* Truitt, 95 Ind. 309, quoting text.

[2] Lyon *v.* Robbins, 45 Conn. 513.

[3] Henderson *v.* Truitt, *supra.*

[4] Sanford *v.* Hill, 46 Conn. 42.

[5] Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Allen *v.* Clark, 17 Ib. 47, per Wilde, J. "The foundation of contribution is a principle of justice and equity; and when there is equal equity, and there is an incumbrance on land belonging to different parties, they ought each to contribute to-

owners to a *pro rata* contribution, they must stand upon the same equal ground. If a mortgagor conveys the mortgaged land in separate parcels by warranty deeds, and afterwards pays the mortgage debt, he is not entitled to contribution from the purchasers, because he pays merely his own debt, which his covenants bound him to pay.[1] And so any one purchasing a part, while the mortgagor himself remains owner of another part, has the right to have the part so remaining in his grantor first applied to satisfy the incumbrance. The heir of the mortgagor is under the same obligation. In Harbert's case it is said that if one is seised of three acres under an incumbrance, and enfeoffs A. of one acre, and B. of another, and the third acre descends to the heir, who discharges the incumbrance, he shall not have contribution, "for he sits in the seat of his ancestor."[2]

If the owner make simultaneous deeds of undivided moieties of the incumbered estate, the grantees stand upon an equal footing in relation to the incumbrance.[3] But if one of these grantees neglect to put his deed upon record, and the other grantee, after recording his deed, sells his moiety to one who has no notice of the conveyance of the other's moiety, this last purchaser stands in the same position as if the other moiety still remained in the original owner, as in fact the record indicates; and therefore such purchaser has the right to have the moiety so remaining first applied to satisfy the incumbrance. The grantee who fails to put his deed on record enables the other grantee to make an apparently good title to the third person purchasing without notice of the incumbrance of the simultaneous deed.[4]

Where several persons own distinct parcels of the mortgaged premises, contribution should be made in proportion to the present value of the several parcels, unaffected by improvements made by either of them.[5]

1091. If a mortgagor sells portions of the mortgaged premises in different parcels at different times by warranty deed, that which he retains is in equity primarily liable as against

wards removing it." See, also, Burget *v.* Greif, 55 Md. 518.

[1] Henderson *v.* Truitt, 95 Ind. 309.

[2] 3 Co. 11 *b*; Hall *v.* Morgan, 79 Mo. 47; Sargeant *v.* Rowsey, 89 Mo. 617.

[3] See Adams *v.* Smilie, 50 Vt. 1.

[4] Chase *v.* Woodbury, 6 Cush. (Mass.) 143.

[5] §§ **1626, 1627**; Bailey *v.* Myrick, 50 Me. 171; Taylor *v.* Bassett, 3 N. H. 294; Aiken *v.* Gale, 37 N. H. 501; Sawyer *v.* Lyon, 10 Johns. (N. Y.) 32; Stevens *v.* Cooper, 1 Johns. (N. Y.) Ch 425; Johnson *v.* White, 11 Barb. (N. Y.) 194; Bates *v.* Ruddick, 2 Iowa, 423; Beall *v.* Barclay, 10 B. Mon. (Ky.) 261.

all but the mortgagee for the whole debt, and such grantee is not required to contribute.[1] As between such purchaser and vendor it is well settled by all the decisions, both American and English, that the purchaser may redeem the mortgage, and enforce it against that portion of the estate still remaining in the hands of the mortgagor.[2] A person having an agreement for purchase, such that he could enforce a specific performance of it in equity, has the same right as an actual purchaser to charge the burden of the incumbrance upon the part of the estate retained by the mortgagor.[3]

The mortgagee may generally enforce his security against the whole mortgaged premises; but if he become the owner of the equity of redemption of the part chargeable with the whole amount of the mortgage, he is required in equity to satisfy his mortgage so far as possible out of that part.[4] Therefore the purchaser by warranty deed of a portion of premises covered by a mortgage may redeem without contribution against a subsequent assignee of the mortgage, when such assignee has also subsequently become the owner of the equity of redemption of the remaining portion of the land, and that is sufficient to satisfy the mortgage debt. The deed of warranty exempts the land described in it from contribution in favor of the mortgagor or any person claiming the remaining land under him, with notice of the prior conveyance.[5]

1092. Portions of the mortgaged premises sold to different persons are chargeable in the inverse order of the conveyances.[6] Upon a decree of foreclosure in such case the portion, if any, still remaining in the hands of the mortgagor, is first subjected to sale; and then the portion last conveyed by him, and so on in the inverse order of the conveyances made by him. This rule is considered in a subsequent chapter, and the authorities are collected.[7] Under the system of registry in general use in this country, this rule seems reasonable and just, as those ac-

[1] § 1620; Wallace *v.* Stevens, 64 Me. 225; Lausman *v.* Drahos, 8 Neb. 457; Henderson *v.* Truitt, 95 Ind. 309; Sargeant *v.* Rowsey, 89 Mo. 617.

[2] Cheever *v.* Fair, 5 Cal. 337; 2 Story's Eq. § 1233; Hall *v.* Morgan, 79 Mo. 47.

[3] Root *v.* Collins, 34 Vt. 173.

[4] McIntire *v.* Parks, 59 N. H. 258.

[5] Bradley *v.* George, 2 Allen (Mass.), 392.

[6] Lyman *v.* Lyman, 32 Vt. 79; Root *v.* Collins, 34 Vt. 173; Gill *v.* Lyon, 1 Johns. (N. Y.) Ch. 447; Clowes *v.* Dickenson, 5 Johns. (N. Y.) Ch. 235; *S. C.* 9 Cow. 403; Skeel *v.* Spraker, 8 Paige (N. Y.), 182; Stuyvesant *v.* Hall, 2 Barb. (N. Y.) Ch. 151; Sanford *v.* Hill, 46 Conn. 42, 53, per Pardee, J. Alexander *v.* Welch, 10 Ill. App. 181.

[7] Chapter XXXVI; §§ 1620–1632.

uiring a subsequent interest in the estate have notice of the con-
lition of it when they take it; but the record is not, in general,
notice to a prior purchaser.[1] The want of a general registry sys-
em in England is undoubtedly the reason why this rule has not
been fully adopted there.

But notice of the equities of prior purchasers may be given in
ther ways than by the registry. A purchaser of a portion of a
ot of land, the whole of which is subject to a prior mortgage,
having notice of a prior unrecorded deed of warranty of an ad-
oining portion of the same lot to a third person, cannot compel
he latter to contribute. A reference in the mortgage deed to such
wner of the adjoining lot amounts to notice of the conveyance.[2]

As between purchasers in succession of different parts of the
quity of redemption of lands there is no contribution, as the
arties do not stand on an equal footing in equity.[3]

One holding a mortgage on two lots of land, on one of which
here is a prior mortgage, cannot be compelled to redeem on a
oreclosure of such prior mortgage, so as to give to a subsequent
nortgagee of the other lot the benefit of the security.[4]

VII. *Pleadings and Practice on Bills to redeem.*

1093. In general. — The only remedy of the mortgagor for
nforcing his right to redeem after a breach of the condition is
y a bill in equity. If the mortgagee is in possession, he has the
ight to retain the possession until his claim upon the property is
aid. So long as the mortgage is in fact not discharged, and is
pparently a subsisting security, the mortgagor cannot obtain
ossession by ejectment.[5] The rule is the same although the
nortgagor claims that the debt has been paid in full. So long
s the mortgage is apparently unsatisfied, and the mortgagee
laims any interest under it, the mortgagor must resort to a suit
n equity to redeem; and although he may allege that the mort-
gage has been paid, or was given for the accommodation of the
nortgagee, and may pray that a decree be entered that it be dis-
harged, yet he should at the same time pray that he be allowed

[1] Beard *v.* Fitzgerald, 105 Mass. 134.

[2] George *v.* Kent, 7 Allen (Mass.), 16.

[3] Gill *v.* Lyon, 1 Johns. (N. Y.) Ch. 47; Clowes *v.* Dickenson, 5 Johns. (N. Y.) Ch. 235, 240.

[4] Lewis *v.* Hinman (Conn.), 13 Atl. Rep. 43.

[5] See § **1093**; Chase *v.* Peck, 21 N. Y. 581; Pell *v.* Ulmar, 18 N. Y. 139; Van Dyne *v.* Thayre, 14 Wend. (N. Y.) 233; Phyfe *v.* Riley, 15 Ib. 248; Woods *v.* Woods, 66 Me. 206.

to redeem, and should offer to do so if anything be found due upon the mortgage.[1] Although the mortgagor is already in the actual possession of the mortgaged estate, he may, after a breach of the condition and payment of the mortgage, or a tender of payment, maintain a bill to redeem, for in legal contemplation his possession is considered that of the mortgagee.[2]

When the condition of the mortgage has been saved by performance of it before any breach has occurred, and the mortgagee being in possession refuses to surrender it, the mortgagor cannot maintain a bill in equity to recover possession, because he then has a complete and adequate remedy at law.[3]

One who has the right to redeem cannot maintain a bill for this purpose after a suit has been brought against him for the foreclosure of the mortgage; nor can he enjoin the prosecution of the foreclosure suit, although he at the same time offers to redeem.[4]

Under a power of sale mortgage, the mortgagor may after a breach of the condition redeem at any time before a sale is actually made under the power, without making a previous tender, provided he offers in his bill to pay what is due.[5]

1094. The bill should conform to the general principles of equity pleading and practice, as modified by the statutes and rules adopted in the state where the action is brought. It should pray for an accounting of what is due upon the mortgage, and, where the mortgagee has been in receipt of rents and profits, for an accounting of these, and that the defendant be adjudged to deliver up the possession of the estate upon payment of the amount found due. A bill which also asks for the correction of accounts already exchanged between the parties is not open to the objection of being multifarious, inasmuch as the accounts relate to the mortgage debt, and the correction asked for is only a different mode of asking for relief by a true account stated.[6]

The plaintiff's bill should contain sufficient averments to meet the case he wishes to make out, and should ask for all the remedy he is entitled to or wishes to obtain. If the mortgagee has been in possession and has received rents and profits, the bill should so

[1] Hill *v.* Payson, 3 Mass. 559; Parsons *v.* Welles, 17 Mass. 419; Newton *v.* Baker, 125 Mass. 30; Beach *v.* Cooke, 28 N. Y. 508. See, however, Farmers' F. Ins. & Loan Co. *v.* Edwards, 21 Wend. (N. Y.) 467; *S. C.* 26 Ib. 540.

[2] Hicks *v.* Bingham, 11 Mass. 300.

[3] Holman *v.* Bailey, 3 Met. (Mass.) 55.

[4] Kilborn *v.* Robbins, 8 Allen (Mass.), 466.

[5] Way *v.* Mullett, 143 Mass. 49.

[6] Greene *v.* Harris, 10 R. I. 382.

allege, and should pray to have an account of them taken; otherwise no deduction will be made upon the mortgage debt on account of such rents and profits.[1]

A bill in equity by a tenant for life prayed that he might be permitted to hold possession of the mortgaged premises upon paying the interest as it might accrue, and that, upon paying the whole amount due upon the mortgage, the mortgagee might be compelled to assign it to him. But as a bill for these purposes is not allowed, it was nevertheless maintained as a bill to redeem simply; inasmuch as it contained an averment that the plaintiff was ready and offered to pay the full amount due on the mortgage, upon an assignment of it to himself, "or in such other way and upon such other terms" as to the court should seem meet; and although the bill did not pray for an account, it alleged that an account had been previously demanded, and prayed for full answers to the bill, and the answer alleged the defendant's readiness to account.[2]

1095. The bill to redeem must make a tender of the amount the plaintiff concedes to be due on the mortgage debt, or must offer to pay whatever may be found to be due.[3] If the bill be brought on the ground of a tender made and refused, the tender should be followed up by a payment into court at the time of filing the bill, which should contain a proper averment of a compliance with this requirement.[4] But although a tender made by the bill should be kept good, the omission ordinarily only raises a question of costs.[5] The mere payment of the money into court, not made upon any tender averred in the bill and proved by evi-

[1] Cree *v.* Lord, 25 Vt. 498.

[2] Lamson *v.* Drake, 105 Mass. 564.

[3] Harding *v.* Pingey, 10 Jur. N. S. 872; Dalton *v.* Hayter, 7 Beav. 313, 319; Tasker *v.* Small, 3 Myl. & Cr. 63; Perry *v.* Carr, 41 N. H. 371; Eastman *v.* Thayer, 60 N. H. 408; Kemp *v.* Mitchell, 36 Ind. 249; Silsbee *v.* Smith, 60 Barb. (N. Y.) 372; *S. C.* 41 How. Pr. 418; Beekman *v.* Frost, 18 Johns. (N. Y.) 544; 1 Johns. Ch. 288; Miner *v.* Beekman, 11 Abb. (N. Y.) Pr. N. S. 147, 163; Crews *v.* Threadgill, 35 Ala. 334; Anson *v.* Anson, 20 Iowa, 55; Hoopes *v.* Bailey, 28 Miss. 328; Coombs *v.* Carr, 55 Ind. 303; Turner *v.* Williams, 63 Ga. 726; Loney *v.* Courtnay (Neb.), 39 N. W. Rep. 616; Still *v.* Buzzell,, 60 Vt. 478; Fouche *v.* Swain, 80 Ala. 151; Adams *v.* Sayre, 70 Ala. 318; Stocks *v.* Young, 67 Ala. 341; Lehman *v.* Collins, 69 Ala. 127; Thomas *v.* Jones (Ala.), 4 So. Rep. 270; Nesbit *v.* Hanway, 87 Ind. 400; Kopper *v.* Dyer, 59 Vt. 477.

[4] Daughdrill *v.* Sweeney, 41 Ala. 310. As to what is a sufficient averment of tender and offer to redeem, see Edgerton *v.* McRea, 6 Miss. (5 How.) 183; Lanning *v.* Smith, 1 Pars. (Pa.) Sel. Cas. 13; Barton *v.* May, 3 Sandf. (N. Y.) Ch. 450; Quin *v.* Brittain, Hoff. (N. Y.) 353.

[5] Lamb *v.* Jeffrey, 41 Mich. 719.

dence, does not amount to a tender, and does not affect the case.[1] A suggestion of the plaintiff's poverty and inability to redeem, for which reason he asks for a sale of the premises, does not excuse the omission of an offer to redeem.[2]

Either an averment of tender or an offer to pay is a necessary part of the bill, and the omission is ground for a demurrer.[3] But although no objection be taken to this omission, relief will be granted only upon condition of payment of what is justly due.[4] An averment of a tender before the filing of the bill is only material as affecting the question of costs, and not the equity of the bill, if this makes a tender.[5] If the mortgagee fraudulently prevents the plaintiff from making a tender by neglecting to render, upon request, an account of the amount due, the failure of the plaintiff to tender or bring into court the amount due is no ground for dismissing the bill;[6] but the decree will require that on payment within a fixed time, the defendant shall release the mortgage.[7]

In like manner tender of the debt should be made in a bill to have an absolute deed declared a mortgage; but when the fact of the loan is established, the omission will only affect the matter of costs.[8]

1096. After payment in full. — If the mortgage has been paid, or if the mortgagee has received rents and profits from the estate sufficient to pay both the principal and interest of the mortgage debt, a tender or offer in the bill to pay whatever may be due is no longer necessary; but the bill should in that case allege the payment of the mortgage, and demand an accounting by the mortgagee.[9] Upon the refusal of the mortgagee to account, and proof that the mortgage is paid, the plaintiff is entitled to a judgment for possession of the premises.[10] The suit in such case is really one to compel a discharge of the mortgage.[11]

[1] Hart *v.* Goldsmith, 1 Allen (Mass.), 145.

[2] Goldsmith *v.* Osborne, 1 Edw. (N. Y.) 560.

[3] Allerton *v.* Belden, 49 N. Y. 373; Silsbee *v.* Smith, 60 Barb. (N. Y.) 372; *S. C.* 41 How. Pr. 418.

[4] Schermerhorn *v.* Talman, 14 N. Y. 93.

[5] Thomas *v.* Jones (Ala.), 4 So. Rep. 270; Essley *v.* Sloan, 16 Ill. App. 63.

[6] Dinsmore *v.* Savage, 68 Me. 191; Meaher *v.* Howes (Me.), 10 Atl. Rep. 460.

[7] Watkins *v.* Watkins, 57 N. H. 462.

[8] Marvin *v.* Prentice, 49 How. (N. Y.) Pr. 385.

[9] Catterlin *v.* Armstrong, 79 Ind. 514; Dennis *v.* Tomlinson (Ark.), 6 S. W. Rep. 11, 13.

[10] Quin *v.* Brittain, Hoff. (N. Y.) 353; Calkins *v.* Isbell, 29 N. Y. 147; Barton, *v.* May, 3 Sandf. (N. Y.) Ch. 450.

[11] Beach *v.* Cooke, 28 N. Y. 508; *S. C.* 39 Barb. 360.

1097. The parties. — As a general rule, all persons who have an interest in the mortgage or in the equity of redemption, which interest is apparent of record or known to the plaintiff, should be made parties to the suit.[1] The plaintiff must have some interest in the equity of redemption, and if there are others also interested in it he must make them parties to the suit, generally as defendants. He must also make defendants all persons who appear to be either legally or equitably interested in the mortgage security.[2] Objection that persons who are necessary parties have not been brought before the court may be taken by answer.[3]

1098. Proper parties plaintiff. — Any one who has a right to redeem is a proper party plaintiff. Upon the death of one having an interest in fee in the land, his heirs or devisees are the proper parties.[4] If part of the mortgage has been paid in the lifetime of the mortgagor, and an account is to be taken of the amount due on the mortgage, the personal representatives of the mortgagor should be joined with the heir or devisee as parties plaintiff; or, in case of their refusal to join in the bill, they should be made defendants.[5] If the mortgage be of a term of years only, this being a personal interest, then only the personal representatives of the mortgagor need be made parties plaintiff.[6]

A wife, in a bill to redeem her own land, need not join her husband.[7] If the equity of redemption has been conveyed, subject to the mortgage, to different persons, or if others have in any way become interested in it, upon redemption by the owner of one part of it, he should join all others having an interest in it as defendants, because they are all interested in the rendering of the mortgagee's account.[8] The interest of the others should appear from the allegations of the bill.[9] If the mortgagor has conveyed the equity of redemption by warranty deed, so that he is liable to discharge the mortgage, the mortgagor should be made a party, so that he may assist in taking the account and be bound by the

[1] Calvert on Parties, 13, 91; Evans *v.* Jones, Kay, 29; Posten *v.* Miller, 60 Wis. 494.

[2] Rowell *v.* Jewett, 69 Me. 293; 71 Me. 408; 73 Me. 365.

[3] Winslow *v.* Clark, 47 N. Y. 261; Dias *v.* Merle, 4 Paige (N. Y.), 259.

[4] Story's Eq. Pl. § 182; Duncombe *v.* Hansley, 3 P. W. 333, n.; Sutherland *v.* Rose, 47 Barb. (N. Y.) 144.

[5] 5 Waite's Prac. 285; Cholmondeley *v.* Clinton, 2 Jac. & W. 135; Rylands *v.* Latouche, 2 Bligh, 566.

[6] Story's Eq. Pl. § 182; Sutherland *v.* Rose, *supra;* Wilton *v.* Jones, 2 Y. & C. C. C. 244.

[7] Hilton *v.* Lothrop, 46 Me. 297.

[8] Story's Eq. Pl. § 183; McCabe *v.* Bellows, 1 Allen (Mass.), 269; Essley *v.* Sloan, 16 Ill. App. 63.

[9] Lovell *v.* Farrington, 50 Me. 239.

decree.[1] If in such case the mortgagor claims that the mortgage is paid, but the holder of it claims that something is still due upon it, the purchaser may properly bring both of them before the court upon a bill to redeem.[2]

1099. Heirs of mortgagor.—Although upon the death of the mortgagor, or other owner of the equity of redemption, his heirs or devisees should bring the suit to redeem ;[3] yet where the suit was brought by the administrator, and it was for the first time objected at the hearing that the heirs should have been joined, it was held that as the heirs were not prejudiced, and the administrator's interest entitled him to redeem, the decree in his favor should be affirmed.[4] In case the mortgage be of a leasehold estate merely, the personal representatives of the deceased mortgagor are the proper parties.[5]

In Massachusetts it is provided by statute that upon the death of the person entitled to redeem without having made a tender for that purpose, his executors or administrators, as well as his heirs or devisees, may make the tender, and commence and prosecute the suit; or they may commence and prosecute a suit founded upon a tender made by the deceased in his lifetime, or they may prosecute a suit begun by him.[6]

As a general rule, trustees who hold the equity of redemption are the proper parties to file a bill to redeem.[7] Assignees or trustees of the equity of redemption for the benefit of creditors may maintain an action to redeem without joining the creditors.[8] In case such assignees or trustees neglect or refuse to act, or are in collusion with the mortgagee, then the creditors, or one for the benefit of all, may bring the action, and join the trustees or assignees as defendants.[9]

A mortgagor who has conveyed his equity of redemption absolutely,[10] or whose right in equity has been sold on execution,[11] or

[1] Story's Eq. Pl. § 183.

[2] Waudle *v.* Turney, 5 Duer (N. Y.), 661.

[3] Sutherland *v.* Rose, 47 Barb. (N. Y.) 144; Elliot *v.* Patton, 4 Yerg. (Tenn.) 10; Smith *v.* Manning, 9 Mass. 422; Putnam *v.* Putnam, 4 Pick. (Mass.) 139.

[4] Enos *v.* Sutherland, 11 Mich. 538; Guthrie *v.* Sorrell, 6 Ired. (N. C.) Eq. 13.

[5] Story's Eq. Pl. § 170.

[6] G. S. 1860, ch. 140, §§ 32, 33.

[7] Dexter *v.* Arnold, 1 Sumn. 109.

[8] Story's Eq. Pl. § 184; Waite's Prac. 286; Hanson *v.* Preston, 3 Y. & C. 229; Cash *v.* Belcher, 1 Hare, 310; Hill *v.* Edmonds, 5 De G. & S. 603.

[9] Troughton *v.* Binkes, 6 Ves. 573; Holland *v.* Baker, 3 Hare, 68.

[10] Hilton *v.* Lothrop, 46 Me. 297. See, however, Clark *v.* Long, 4 Rand. (Va.) 451.

[11] Thorpe *v.* Ricks, 1 Dev. & B. (N. C.) Eq. 613.

assigned in bankruptcy,[1] need not be made a party to the suit to redeem.

1100. The parties defendant to a bill to redeem should be all persons legally or beneficially interested under the mortgage. If there be no outstanding interest under the mortgagee, he is the only necessary party. If he be dead, his heirs at law or devisees, in whom the legal estate is vested, must be made parties; and the personal representative of the mortgagee should also be made a party, because he is entitled to recover the money paid.[2] If the mortgage was given to a surety, the principal creditor is a necessary party.[3]

The person who is the legal holder of the mortgage at the time the action is brought is always a necessary party, whether he be mortgagee or assignee of the mortgage;[4] and all holders of the mortgage who have been in possession of the estate, and have received rents and profits, should be made parties for the purpose of taking the account. Except in such case, the holders of the mortgage prior to the holder at the time of the commencement of the suit, who have no longer any interest in the security, are not necessary parties to it.[5]

All the mortgagees or assignees of it, in whom the legal title is vested, are necessary parties.[6]

When redemption is sought by one who was not made a party to a foreclosure suit, and whose rights were in consequence not barred by it, he should not join with the purchaser as defendant any one who was made a party to the foreclosure suit, and whose rights are extinguished.[7]

The mortgagee is the only necessary party when no one else is interested under him in the mortgage. If he has assigned his mortgage as collateral security, or has assigned a part interest only in the mortgage, he is still a necessary party, as also is his assignee.[8] If he has made an absolute conveyance of the estate

[1] Kerrick *v.* Saffery, 7 Sim. 317; Lloyd *v.* Lander, 5 Madd. 282; Jones *v.* Binns, 33 Beav. 362; Metropolitan Bank *v.* Offord, L. R. 10 Eq. 398.

[2] Story's Eq. Plead. § 188; Hilton *v.* Lothrop, 46 Me. 297; Dexter *v.* Arnold, 1 Sumn. 109.

[3] Hudson *v.* Kelly, 70 Ala. 393.

[4] Yelverton *v.* Shelden, 2 Sandf. (N. Y.) Ch. 481.

[5] Whitney *v.* M'Kinney, 7 Johns. (N. Y.) Ch. 144.

[6] Woodward *v.* Wood, 19 Ala. 213.

[7] 5 Wait's Prac. 286.

[8] Norrish *v.* Marshall, 5 Madd. 475; Hobart *v.* Abbot, 2 P. Wms. 643; Winslow *v.* Clark, 47 N. Y. 261; Dias *v.* Merle, 4 Paige (N. Y.), 259; Davis *v.* Duffie, 8 Bosw. (N. Y.) 617; *S. C.* 4 Abb. Pr. N. S. 478.

as security, his grantee must be joined with him.[1] Even after any absolute assignment, the mortgagee, though no longer a necessary party,[2] may properly be joined as a defendant, especially if it appears that he is in any way interested in taking the account.[3] But a prior assignee of the mortgage who has not become liable for the debt, and who has not become accountable for rents and profits, should not be made a party to the bill, unless he is charged with fraud or collusion, or a discovery is sought from him.[4] If the mortgage has been assigned, or the mortgage interest in the land has been conveyed upon trusts declared, the trustee and the *cestui que trust* as well should be made parties to the action.[5]

One who has purchased under a defective foreclosure sale is in effect an assignee of the mortgage, and as such he must be made a party to the suit. If he has granted portions of the property to others, they thereby become assignees of a part of the mortgage in proportion to the value of their respective purchases; and upon redemption the money paid must be divided in proportion to the purchase money paid by each, and in the order of the purchases.[6]

1101. Upon the death of a mortgagee of an estate in fee, according to the English rule, his heir or devisee must be made a party, because the legal estate is in him; and the personal representative must also be made a party, because he is generally entitled to the money when it is paid.[7] If the mortgage be of a leasehold estate, the personal representative only of the mortgagee without the heir should be made defendant, because he alone is interested in the term.[8] In those states where the common law doctrine that the legal estate is in the mortgagee has given place to the doctrine that he has only a lien for the security of his claim without any legal estate, the mortgagee's administrator is the only necessary party in such case.[9]

Where the heirs at law of the mortgagee entered upon the

[1] Winslow *v.* Clark, 47 N. Y. 261; Dias *v.* Merle, 4 Paige (N. Y.), 259; Davis *v.* Duffie, 18 Abb. (N. Y.) Pr. 360; Brown *v.* Johnson, 53 Me. 246.

[2] Beals *v.* Cobb, 51 Me. 348.

[3] Doody *v.* Pierce, 9 Allen (Mass.), 141; Wing *v.* Davis, 7 Me. 31; Whitney *v.* M'Kinney, 7 Johns. (N. Y.) Ch. 144.

[4] Williams *v.* Smith, 49 Me. 564.

[5] Wetherell *v.* Collins, 3 Madd. 255; Drew *v.* Harman, 5 Price, 319; Whistler *v.* Webb, Bunb. 53.

[6] Davis *v.* Duffie, 8 Bosw. (N. Y.) 617; aff'd 3 Keyes, 606; *S. C.* 4 Abb. Pr. N. S. 478.

[7] Story's Eq. Pl. § 188; Anon. 2 Freem. 52.

[8] Osbourn *v.* Fallows, 1 Russ. & M. 741.

[9] Copeland *v.* Yoakum, 38 Mo. 349.

land and took all the needful steps to foreclose if they had been entitled to foreclose, and held open and peaceable possession for more than eight years, when an administrator was first appointed upon the petition of the mortgagor, who thereupon filed a bill in equity to redeem, it was held that he was entitled to redeem, and to an account of the rents and profits wrongfully received by the heirs. The heirs having entered under the mortgage, and having alleged a foreclosure in their answer, cannot shield themselves from accountability by saying that they occupied as mere strangers and disseisors. The administrator is properly made a party, because he is the person to whom the balance is to be paid by the plaintiff. The heirs being in effect executors in their own wrong are interested in the account, and therefore are proper parties to the bill.[1]

1102. When a junior mortgagee seeks to redeem he must make the mortgagor or other representative of the realty a party, and the prior mortgagees as well. Though the object be merely to redeem a prior mortgage, the owner of the equity of redemption is a necessary party, because a court of equity always seeks to determine the rights of all parties interested in the estate; and to do this in such case the decree should be that the second mortgagee redeem the first mortgage, and that the owner of the equity of redemption redeem the second mortgage or stand foreclosed. If the owner of the equity of redemption be not made a party, his right to redeem remains open, and the first mortgagee may be exposed to another suit.[2] If the junior mortgagee is unable to foreclose his mortgage, for the reason that it is not due or for other cause, then he cannot redeem a prior mortgage against the consent of the holder of it; for in such case he cannot bring the mortgagor before the court for the purpose of completing his remedy by foreclosure, and he cannot compel the mortgagee to assign to him.[3] Of course he may, at a foreclosure sale by the prior mortgagee, buy the estate; and it is said that the court may restrain the prior mortgagee from making a sudden sale for the purpose of preventing a redemption or purchase by the junior mortgagee.[4]

[1] Haskins *v.* Hawkes, 108 Mass. 379.

[2] Story's Eq. Pl. § 186, and cases cited; Fell *v.* Brown, 2 Bro. C. C. 276; Palk *v.* Clinton, 12 Ves. 48; Farmer *v.* Curtis, 2 Sim. 466; Caddick *v.* Cook, 32 Beav. 70; *S. C.* 9 Jur. N. S. 454; 32 L. J. N. S. Ch. 769.

[3] Ramsbottom *v.* Wallis, 5 L. J. Ch. N. S. 92; Rhodes *v.* Buckland, 16 Beav. 212.

[4] Rhodes *v.* Buckland, *supra.*

The first mortgagee, after having filed a bill of foreclosure, is not justified in refusing a tender of the principal and interest due him, and in insisting upon a redemption only by the ordinary suit in court.[1]

When a subsequent mortgagee of a part of the estate comprised in the first mortgage redeems, he must make the owners of all parts of that estate parties to his suit,[2] for the prior mortgage must be redeemed entirely or not at all; and if the owner of the equity of redemption of any part of that estate is not brought before the court, the mortgagee may be subjected to another suit.

1103. A person to whom the mortgage note has been transferred without an assignment of the mortgage has an equitable interest in the mortgage, and should be made a party to the bill.[3]

It would seem that in a bill to redeem where a mortgagee has indirectly become the purchaser at a sale under a power in the mortgage, which gave him no right to purchase, and the property sold for a less sum than the mortgage debt, the bill proceeding on the ground that the purchase from his grantee was not a *bonâ fide* purchase, the mortgagee should be made a party to the bill, because he apparently retained the original debt to which the mortgage is incident.[4]

A mortgagee who has assigned his mortgage and note as collateral security for his own debt must be made a party to a bill to redeem, as well as the person who received such assignment.[5]

1104. Reference to state account. — Where the mortgagee has been in possession and an account of the rents and profits is demanded, the usual practice is to order a reference to a master to state an account. The reference generally embraces not only an accounting of the rents and profits, but also of the amount due on the mortgage. Even when the mortgagee has not received the rents and profits a reference may be had, especially upon a default to determine the amount due on the mortgage.[6] The case may be sent to a master to take evidence and state an account after it has been set down for hearing on the bill and answer.[7] If there be a conflict of testimony as to the amount that has been

[1] Smith *v.* Green, 1 Coll. 555.

[2] Palk *v.* Clinton, 12 Ves. 48; Peto *v.* Hammond, 29 Beav. 91; Thorneycroft *v.* Crockett, 2 H. L. C. 239.

[3] Stone *v.* Locke, 46 Me. 445.

[4] Burns *v.* Thayer, 115 Mass. 89.

[5] Brown *v.* Johnson, 53 Me. 246.

[6] Doody *v.* Pierce, 9 Allen (Mass.), 141; 5 Wait's Prac. 288.

[7] Doody *v.* Pierce, *supra.*

paid upon the mortgage the court will not determine it, but will refer the case to a master.[1]

After the plaintiff by his bill has admitted that a certain sum is due on the mortgage, the defendant claiming a larger sum, the master cannot report that nothing is due.[2]

1105. Defences. — The consideration of the mortgage cannot be inquired into unless the plaintiff lays the foundation for the inquiry by proper averments in the bill.[3] On the other hand, as a general thing it is wholly immaterial to the mortgagee in what manner, for what object, or what consideration, the owner of the equity of redemption acquired his title.[4] The mortgagee cannot defend upon the ground that plaintiff is not the real owner of the equity of redemption; that the money for the purchase of the property was furnished by another person, as, for instance, the husband, where the wife was the apparent owner and the plaintiff in the suit to redeem.[5]

A first mortgagee cannot defend a bill brought by a subsequent mortgagee upon the ground that the mortgage was fraudulent as against the mortgagor's creditors.[6] But he may show that such mortgage was never delivered, and is therefore not a valid conveyance between the parties to it.[7]

If the plaintiff has an equitable right to redeem, it is no defence that he has verbally contracted to sell the land.[8] If the mortgagor in his bill to redeem alleges payment of the mortgage prior to the mortgagee's entry upon the land fifteen years before, the burden of proving payment is upon him, and if he does not sustain it the bill is dismissed with costs.[9]

After an express waiver by the defendant in his answer of all objection to the plaintiff's redeeming upon payment of all sums found due, he cannot afterwards insist that the mortgage had been foreclosed before the bringing of the suit.[10] In a bill to redeem by the mortgagor, he may set up the reservation of usurious interest on the mortgage debt, and is entitled to the statute penalty for usury in reduction of the sum payable on the mortgage.[11]

[1] Bartlett *v.* Fellows, 47 Me. 53; Jewett *v.* Guild, 42 Me. 246.

[2] Bellows *v.* Stone, 18 N. H. 465.

[3] Dexter *v.* Arnold, 2 Sumn. 108.

[4] Beach *v.* Cooke, 28 N. Y. 508; *S. C.* 39 Barb. (N. Y.) 360.

[5] Green *v.* Dixon, 9 Wis. 532.

[6] Livingston *v.* Ives, 35 Minn. 55.

[7] Powers *v.* Russell, 13 Pick. (Mass.) 69.

[8] Patterson *v.* Yeaton, 47 Me. 308.

[9] Furlong *v.* Randall, 46 Me. 79.

[10] Strong *v.* Blanchard, 4 Allen (Mass.), 538.

[11] Hart *v.* Goldsmith, 1 Allen (Mass.), 145; Smith *v.* Robinson, 10 Allen (Mass.),

And so also in a writ of entry by the mortgagee to foreclose, the mortgagor may avail himself of usury as a defence and in reduction of the amount for which conditional judgment shall be entered;[1] but no deduction is to be made for usury paid under a verbal agreement not incorporated in the written contract.[2] After a usurious debt has been settled, by the mortgagee's taking the property mortgaged to secure it in satisfaction of it, the transaction will not be opened, and redemption allowed on account of the usury.[3] No deduction can be made for usurious interest already paid by a former owner.[4]

Neither can the mortgagor be allowed in the account treble damages for waste committed by the mortgagee pending the bill to redeem, as such damages can only be enforced in the manner provided by statute.[5]

Usury cannot be shown in defence to a bill to redeem unless the usury and the facts and circumstances constituting it are set up in the answer.[6]

1106. The decree. — The form of the judgment ordinarily is that the plaintiff may redeem upon paying the amount found due on the mortgage within a specified time, together with costs; and that upon his doing so the defendant shall discharge the mortgage and deliver up the mortgaged premises; and that upon default of such payment the complaint be dismissed with costs.[7]

A decree which declares that upon redemption the mortgagor shall hold the premises discharged of the mortgage and free from all right, title, and estate under the mortgage, gives no rights as against tenants of the mortgagee beyond what he would otherwise have upon redemption.[8]

When nothing is found due to the mortgagee, the mortgagor is not only entitled to a discharge of the mortgage but to a judgment for possession, and to a writ of possession to recover it.[9]

1107. The decree should fix a time within which the redemption is to take place. This time rests in the sound dis-

130; Gerrish *v.* Black, 104 Mass. 400; *S. C.* 99 Mass. 315; 113 Mass. 486; 122 Mass. 76.

[1] Ramsay *v.* Warner, 97 Mass. 8.

[2] Minot *v.* Sawyer, 8 Allen (Mass.), 78.

[3] Adams *v.* McKenzie, 18 Ala. 698.

[4] Perrine *v.* Poulson, 53 Mo. 309; Kirkpatrick *v.* Smith, 55 Mo. 389.

[5] Boston Iron Co. *v.* King, 2 Cush. (Mass.) 400.

[6] Waterman *v.* Curtis, 26 Conn. 241.

[7] 5 Wait's Prac. 288; Pitman *v.* Thornton, 66 Me. 469; Kolle *v.* Clausheide, 99 Ind. 97; Decker *v.* Patton (Ill.), 11 N. E. Rep. 897, quoting text; McKenna *v.* Kirkwood, 50 Mich. 544.

[8] Holt *v.* Rees, 46 Ill. 181.

[9] Churchill *v.* Beale, MSS. 2 Benn. & Heard Dig. (Mass.) 306. See Gerrish *v.* Black, 122 Mass. 76.

cretion of the court in view of all the circumstances.[1] The usual time was formerly six months;[2] if the plaintiff neglected to redeem within the time specified his right was barred forever;[3] but the time is a matter within the discretion of the court, and a year is allowed in some states.[4] Additional time might be allowed to enable the plaintiffs to obtain contribution from one of the defendants who is also interested in the equity of redemption;[5] or it may be allowed when the failure to pay was occasioned by fraud, accident, or mistake;[6] but if the negligence of the complainant himself has contributed to such failure, it is proper to refuse to extend the time.[7] The time of redemption was extended for thirty days, where the decree omitted to declare what should be the effect of an omission to redeem, although the effect of such decree was, the court declared, that if the plaintiff should fail to pay the money within the time specified, his right to redeem would be barred.[8] But the same reasons do not exist for such extension of the time that exist in case of a strict foreclosure, because in redemption the plaintiff should be prepared to pay, and he in fact proffers payment by his bill.[9]

Instead of a decree requiring the mortgagor to pay the debt by a given day, or that his bill shall stand dismissed, the practice has sometimes prevailed in some states to order a sale of the property and the payment of the mortgage out of the proceeds, and the surplus to the mortgagor. The defendant may also in his answer ask a foreclosure.[10]

1108. If a mortgagor, who has brought a bill to redeem, fails to pay the amount found due within the time ordered,

[1] Decker *v.* Patton (Ill.), 11 N. E. Rep. 897; 20 Ill. App. 210.

[2] § 1563; Novosielski *v.* Wakefield, 17 Ves. 417. **New York**: Waller *v.* Harris, 7 Paige, 167; Perine *v.* Dunn, 4 Johns. Ch. 140; Brinckerhoff *v.* Lansing, Ib. 65; Dunham *v.* Jackson, 6 Wend. 22. See Hollingsworth *v.* Koon, 117 Ill. 511, where a limitation of the time to three months was adjudged improper and oppressive.

[3] Sherwood *v.* Hooker, 1 Barb. (N. Y.) Ch. 650; Kolle *v.* Clausheide, 99 Ind. 97.

[4] Murphy *v.* N. H. Sav. Bank, 63 N. H. 362.

[5] Brinckerhoff *v.* Lansing, *supra.*

[6] Kopper *v.* Dyer, 59 Vt. 477; 9 Atl. Rep. 4.

[7] Segrest *v.* Segrest, 38 Ala. 674; Cilley *v.* Huse, 40 N. H. 358; Francis *v.* Parks, 55 Vt. 80.

[8] Sherwood *v.* Hooker, 1 Barb. (N. Y.) Ch. 650.

[9] Jenkins *v.* Eldredge, 1 Wood. & M. 61; Perine *v.* Dunn, 4 Johns. (N. Y.) Ch. 140.

[10] **Virginia**: Turner *v.* Turner, 3 Munf. 66. **North Carolina**: Ingram *v.* Smith, 6 Ired. Eq. 97. **New York**: Darvin *v.* Hatfield, 4 Sandf. 468; Sutherland *v.* Rose, 47 Barb. 144. **Michigan**: Meigs *v.* McFarlan, 40 N. W. Rep. 246.

and the mortgagee obtains judgment for costs, the mortgage is foreclosed without any formal decree dismissing the bill;[1] although, according to other authorities, a final decree of dismissal must be first entered, upon the ground that until such final order is entered the records of the court are not complete, and the plaintiff may come in with an application to have the time within which he may redeem extended.[2] The decree of dismission with costs is equivalent to a decree of foreclosure,[3] and has this effect although it does not expressly declare it.[4] It is irregular to decree a sale of the lands, when the bill to redeem contains no prayer for a sale and the mortgagee has not filed a cross-bill.[5]

If the plaintiff after obtaining a judgment for redemption fails to pay the amount found due within the time allowed, his bill will be dismissed with costs, and such a dismissal amounts to a foreclosure of his equity of redemption.[6] It is dismissed as a matter of course upon motion supported by affidavit that the time within which the plaintiff was allowed to redeem has expired, and the money found due has not been paid.[7]

1109. Abandonment of suit. — A mortgagor of land subject to two mortgages filed a bill to redeem it from the first just before the expiration of the three years after open and peaceable entry. While the suit was pending, and after the three years expired, the first mortgagee executed a quitclaim deed of the land to the second mortgagee. It was held that upon the subsequent abandonment of the suit by the mortgagor, the second mortgagee succeeded to all the rights of the first mortgagee, and held the estate by an indefeasible title under a completed foreclosure.[8] The plaintiff in a bill to redeem may be debarred from his right to redeem by improper delay in prosecuting his suit after it is commenced.[9]

1110. Redemption does not necessarily extinguish the mort-

[1] Stevens *v.* Miner, 110 Mass. 57.

[2] Bolles *v.* Duff, 43 N. Y. 469; Smith *v.* Bailey, 10 Vt. 163.

[3] Quin *v.* Brittain, Hoff. (N. Y.) 353; Shannon *v.* Speers, 2 A. K. Marsh. (Ky.) 311.

[4] Bolles *v.* Duff, *supra;* Beach *v.* Cooke, 28 N. Y. 508, 535; Perine *v.* Dunn, 4 Johns. (N. Y.) Ch. 140; Sherwood *v.* Hooker, 1 Barb. (N. Y.) Ch. 650; Adams *v.* Cameron, 40 Mich. 506.

[5] Lindsay *v.* Matthews, 17 Fla. 575.

[6] Winchester *v.* Paine, 11 Ves. 194, 199; Cholmley *v.* Oxford, 2 Atk. 267; Perine *v.* Dunn, *supra.*

[7] M'Donough *v.* Shewbridge, 2 Ball & B. 555, 564; Stuart *v.* Worrall, 1 Bro. C. C. 581.

[8] Thompson *v.* Kenyon, 100 Mass. 108.

[9] Bancroft *v.* Sawin, 143 Mass., 144; 9 N. E. Rep. 539.

gage title. If the plaintiff owns every other interest in the land there is a merger of this title; but if there are intermediate incumbrances, he becomes substituted to the rights and interests of the original mortgagee; and such incumbrancer must redeem of him if he wishes to protect his own interest.[1]

1111. The general rule in regard to costs upon a suit to redeem is that the plaintiff, instead of recovering costs himself, pays them to the defendant, although he is successful in the suit.[2] This is upon the principle that at law the mortgage is forfeited, and that the legal estate being in the mortgagee he is at liberty to deal with the property as his own.[3] The mortgagor, on the other hand, is in default; and this relief in equity is in the nature of a favor conferred, and not a right contracted for. An exception is made to this rule where the defendant sets up an unwarranted defence, or one which wholly fails, and thereby makes delay and expense in prosecuting the redemption; in such case the defendant may, in the discretion of the court, be compelled to pay costs to the plaintiff.[4] If the amount due upon the mortgage is in dispute, although the defendant proves to be in error, yet, if he had a reasonable ground for his view of the case, the costs will still be awarded against the plaintiff.[5] The court may also require each party to pay his own costs.[6]

In suits to redeem, costs are sometimes not allowed to either party as against the other.[7] This has been the rule adopted by some courts where the plaintiff before bringing his suit tendered the amount due upon the mortgage, and any costs which had been incurred.[8]

If a tender be made by the mortgage debtor after the bringing of a suit to foreclose, as the amount of costs in an equitable suit for the purpose is discretionary with the court, he can only make tender of such costs as may seem to him reasonable, and

[1] Brainard *v.* Cooper, 10 N. Y. 356.

[2] Harper *v.* Ely, 70 Ill. 581; Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48; Brockway *v.* Wells, Ib. 617; Benedict *v.* Gilman, 4 Ib. 58; Vroom *v.* Ditmas, Ib. 526; Bean *v.* Blackett, 35 N. H. 88; Phillips *v.* Hulsizer, 20 N. J. Eq. 308; Blum *v.* Mitchell, 59 Ala. 535; Turner *v.* Johnson (Mo.) 7 S. W. Rep. 570.

[3] Wetherell *v.* Collins, 3 Madd. 255.

[4] Davis *v.* Duffie, 18 Abb. (N. Y.) Pr. 360; Barton *v.* May, 3 Sandf. (N. Y.) Ch. 450; Still *v.* Buzzell, 60 Vt. 478; Turner *v.* Johnson, *supra*.

[5] Sessions *v.* Richmond, 1 R. I. 298; Wells *v.* Van Dyke, 109 Pa. St. 330, quoting text.

[6] Hollingsworth *v.* Koon, 117 Ill. 511.

[7] Green *v.* Wescott, 13 Wis. 606.

[8] King *v.* Duntz, 11 Barb. (N. Y.) 191; Van Buren *v.* Olmstead, 5 Paige (N. Y.), 9.

upon refusal apply to the court to have the amount of costs determined.[1]

1112. Under a statute providing that the plaintiff bringing a suit to redeem without a previous tender shall pay the costs of suit, unless the defendant, when requested, has neglected or refused to render a just and true account, the plaintiff so bringing suit is liable for costs, although the defendant be liable under the usury law to forfeit threefold the unlawful interest.[2]

In Massachusetts it is provided by statute that if the suit is brought without a previous tender, and it appears that anything is due upon the mortgage, the plaintiff shall pay the costs of suit, unless the defendant has unreasonably refused or neglected, when requested, to render a true account of the money due on the mortgage, and of the rents and profits, or has in any way prevented the plaintiff from performing or tendering performance of the condition before bringing suit. In all other cases the court may award costs to either party as equity may require.[3] Under these provisions the mortgagee may be ordered to pay the plaintiff's costs when, upon request for an account, he has failed to render any account, or has rendered an untrue one, so that the mortgagor is compelled to resort to a suit.[4] But in a case where there was no tender, and the account rendered by the mortgagee was incorrect only because it contained items of money expended for convenience and ornament of the estate, costs were allowed to neither party.[5]

There is a similar statute in Maine.[6] As the law now stands in this state no suit can be maintained without a tender, unless the defendant is in default in preventing a tender. If the bill is sustained, the plaintiff is in all cases entitled to costs as a strict legal right.[7]

What constitutes a sufficient demand and refusal to account under this statute depends upon the particular circumstances;

[1] Pratt *v.* Ramsdell, 16 How. (N. Y.) Pr. 59; Bartow *v.* Cleveland, Ib. 364. The statute providing for tender to a plaintiff to stop costs is confined to actions at law. New York F. & M. Ins. Co. *v.* Burrell, 9 How. (N. Y.) Pr. 398.

[2] Gerrish *v.* Black, 113 Mass. 486; *S. C.* 99 Mass. 315; 104 Mass. 400; 122 Mass. 76. And see McGuire *v.* Van Pelt, 55 Ala. 344.

[3] G. S. ch. 140, § 21.

[4] Montague *v.* Phillips, 15 Gray (Mass.), 566; Pease *v.* Benson, 28 Me. 336; Roby *v.* Skinner, 34 Me. 270; Sprague *v.* Graham, 38 Me. 328; Dinsmore *v.* Savage, 68 Me. 191.

[5] Woodward *v.* Phillips, 14 Gray (Mass.), 132.

[6] R. S. 1871, ch. 90, § 13; Dinsmore *v.* Savage, *supra;* Hall *v.* Gardner, 71 Me. 233.

[7] Dinsmore *v.* Savage, *supra.*

thus when the mortgagor made a demand on the mortgagee at a store two miles distant from his residence to render an account, to which the reply was that about the sum of eleven hundred dollars was due, and the mortgagee, when afterwards requested to render a more particular account, replied that he would not until obliged, no objection being made to the place of demand, it was considered sufficient to sustain a bill to redeem brought four years afterwards.[1]

1113. In exceptional cases the mortgagee is liable for costs upon redemption. A mortgagee who has refused a tender of a sum sufficient to cover principal, interest, and costs will be compelled to pay the costs of a suit to redeem.[2]

A mortgagee who has refused to inform a purchaser of the equity of redemption, of whose rights he has notice, of the amount due him, and without demand of payment takes possession in the owner's absence, is not entitled to costs.[3]

The costs of a suit to foreclose a prior mortgage are not chargeable to a junior mortgagee who was not a party to it, when he redeems.[4]

[1] Wallace *v.* Stevens, 66 Me. 190.

[2] Grugeon *v.* Gerrard, 4 Y. & C. 128; Harmer *v.* Priestley, 16 Beav. 569.

[3] Meigs *v.* M'Farlan (Mich.), 40 N. W. Rep. 246.

[4] Gage *v.* Brewster, 31 N. Y. 218, reversing *S. C.* 30 Barb. 387.

CHAPTER XXIII.

MORTGAGEE'S ACCOUNT.

I. Liability to account, 1114–1120.
II. What the mortgagee is chargeable with, 1121–1125.
III. Allowances for repairs and improvements, 1126–1131.
IV. Allowances for compensation, 1132, 1133.
V. Allowances for disbursements, 1134–1138.
VI. Annual rests, 1139–1143.

I. *Liability to Account.*

1114. In general. — A mortgagee in possession, whether in person, by trustee, receiver, or by a tenant, is in equity accountable for the rents and profits of the estate, and is bound to apply them in reduction of the mortgage debt.[1] After paying the interest of the debt, any balance of receipts is applicable to reduce the principal.[2] The mortgagee is not allowed to make a profit out of his possession of the estate. Therefore, upon a redemption of the mortgaged premises by any one interested in them he is obliged to state an account of his receipts from the mortgaged property, and he is entitled to allowances for all proper disbursements made by him in respect of the premises. The principles upon which this account should be stated it is the purpose of this chapter to set forth. The subject is of much less general importance than it formerly was, for the reason that it is comparatively seldom now that the mortgagee takes possession. In many states, as already noticed, the mortgagee is prohibited by statute from entering or in any way acquiring possession before a foreclosure and sale. In other states, power of sale mortgages and trust deeds are in common use, and upon a default a speedy sale of the property may be had, so that there is not generally any oc-

[1] Harrison *v.* Wyse, 24 Conn. 1; Kellogg *v.* Rockwell, 19 Conn. 446; Reitenbaugh *v.* Ludwick, 31 Pa. St. 131; Breckenridge *v.* Brooks, 2 A. K. Marsh. (Ky.) 335; Tharp *v.* Feltz, 6 B. Mon. (Ky.) 6; Anthony *v.* Rogers, 20 Mo. 281; Chapman *v.* Porter, 69 N. Y. 276; Dawson *v.* Drake, 30 N. J. Eq. 601; Rooney *v.* Crary, 11 Ill. App. 213; Wood *v.* Whelen, 93 Ill. 153; Davis *v.* Lassiter, 20 Ala. 561; Toomer *v.* Randolph, 60 Ala. 356; Downs *v.* Hopkins, 65 Ala. 508; Greer *v.* Turner, 36 Ark. 17.

[2] McConnel *v.* Holobush, 11 Ill. 61; Walton *v.* Withington, 9 Mo. 549.

casion for the mortgagee to take possession of the mortgaged estate.

This liability of the mortgagee to account arises only when the mortgagee's entry and possession are in recognition of the mortgage. If he enters as a trespasser or as the tenant of the mortgagor, whatever his liabilities may be, they are not to be enforced in equity under a bill for an account and for redemption.[1]

1115. This is a matter of equitable jurisdiction. It is apparent enough that where the English doctrine prevails that the mortgage conveys a legal title, the right of the mortgagor to an account of the rents and profits of the land received by the mortgagee is purely and exclusively of equitable cognizance. At law he cannot be made to account. He is the legal owner of the estate, and takes the rents and profits in that character. The mortgagor has a right of redemption only in equity, and the right to an account is only incident to this.[2] But regarding the mortgagee's interest as a lien only, does not obviate the necessity of resorting to equity for an accounting.[3] The mortgagee in possession takes the rents and profits in the *quasi* character of trustee or bailiff of the mortgagor. In equity he must apply them as an equitable set-off to the amount due on the mortgage. Such a receipt is not a legal satisfaction of the mortgage. There is no payment and satisfaction of the mortgage until the rents and profits are applied to the payment of the debt. The law does not apply them as they are received.[4]

Since the mortgagee's accounting is a matter purely of equita-

[1] Daniel *v.* Coker, 70 Ala. 260. So where the mortgagee's possession was only as husband of one of the mortgagors. Young *v.* Omohundro (Md.), 16 Atl. Rep. 120.

[2] Toomer *v.* Randolph, 60 Ala. 356; Dailey *v.* Abbott, 40 Ark. 275.

[3] Hubbell *v.* Moulson, 53 N. Y. 225; Farris *v.* Houston, 78 Ala. 250, quoting text.

[4] Hubbell *v.* Moulson, *supra.* "It depends upon the result of an accounting upon equitable principles whether any part of the rents and profits received shall be so applied. The mortgagee is entitled to have them applied, in the first instance, to reimburse him for taxes and necessary repairs made upon the premises; for sums paid by him upon prior incumbrances upon the estate, in order to protect the title, and for costs in defending it; and if he has made permanent improvements upon the land, in the belief that he was the absolute owner, the increased value by reason thereof may be allowed him. In many cases complicated equities must be determined and adjusted before it can be ascertained what part, if any, of the rents and profits received, is to be applied upon the mortgage debt. In the absence of an agreement between the parties, there is no legal satisfaction of the mortgage by the receipt of rents and profits by a mortgagee in possession, to an amount sufficient to satisfy it, and his character as mortgagee in possession is not divested until they are applied by the judgment of the court in satisfaction of the mortgage." Per Mr. Justice Andrews.

ble jurisdiction, he cannot be compelled in any other way to account. A creditor of the mortgagor cannot, by garnishment against the mortgagee, reach and subject rents and profits received by him in excess of his demand. Garnishment is a legal proceeding, and operates only upon legal rights which the principal debtor could enforce in a court of law.[1]

1116. The mortgagee is chargeable only upon redemption. The mortgagor's right to hold the mortgagee to account for rents and profits of the mortgaged premises, or for waste done to them, must be enforced in equity and not by suit at law.[2] Though the rents received may be sufficient to satisfy the debt in full, the only remedy of the mortgagor is by a bill in equity for an account and redemption.[3] He is not chargeable so long as the premises are not redeemed. He is the legal owner of the estate, and his accountability for rent is incident only to the right in equity to redeem. There may be a special agreement between the parties that the mortgagee shall pay rent; he may be a lessee of the premises; but after the expiration of the term of his tenancy, there is no implication of an agreement to continue to pay rent.[4] If an estate under lease for a term of years be mortgaged to the lessee in fee, unless the mortgagee voluntarily pays the rent, or the mortgage makes special provision that he shall hold possession in the capacity of lessee, the rent is suspended until the condition be performed, or the estate redeemed. Upon redemption, of course, the lessee, during the term of the lease, will be accountable as mortgagee for the profits. If, however, he voluntarily pay the rent during such term, he is not afterwards accountable for the same as mortgagee.[5]

A mortgagor who has paid the mortgage debt, without requiring the mortgagee to account for rents received by him while he was in possession, cannot afterwards maintain an action against him for use and occupation; but he may maintain an action for money had and received to recover back the amount overpaid, which ought to have been allowed for rent;[6] and if the rents and

[1] Toomer *v.* Randolph, 60 Ala. 356.

[2] Farrant *v.* Lovel, 3 Atk. 723; Dexter *v.* Arnold, 2 Sumn. 108, 124; Gordon *v.* Hobart, 2 Story, 243; Seaver *v.* Durant, 39 Vt. 103; Chapman *v.* Smith, 9 Vt. 153; Givens *v.* M'Calmot, 4 Watts (Pa.), 460, 464; Bell *v.* Mayor of N. Y. 10 Paige (N. Y.), 49; Daniel *v.* Coker, 70 Ala. 260; Farris *v.* Houston, 78 Ala. 250; Garland *v.* Watson, 74 Ala. 323.

[3] Farris *v.* Houston, *supra.*

[4] Weeks *v.* Thomas, 21 Me. 465.

[5] Newall *v.* Wright, 3 Mass. 138.

[6] Wood *v.* Felton, 9 Pick. (Mass.) 171 see, however, Barrett *v.* Blackmar, 47 Iowa, 565.

profits exceed the amount of the debt and interest, the excess may be recovered.[1]

On a bill to redeem against two persons, if one of them alone has received rents and profits more than sufficient to pay the mortgage debt, he alone should be ordered to pay over the surplus.[2]

An action of trespass *quare clausum* will not lie by a mortgagor against his mortgagee for entering and harvesting the growing crops. These are vested in the mortgagee, and he is entitled to them as a part of his security; and is liable to account for them only in equity upon a redemption.[3] The objection to such action does not lie when there is an agreement between the parties which makes the mortgagor a tenant of the mortgagee.[4]

A prior mortgagee in possession must account to a subsequent mortgagee upon his redeeming; but a subsequent mortgagee in possession is not bound to account to a prior mortgagee.[5] A prior mortgagee can always secure the rents and profits as against a subsequent mortgagee by taking possession.

1117. A grantee in possession under a deed absolute in form, but given by way of security merely, is said not to stand exactly in the same position, in reference to accounting, as an ordinary mortgagee in possession; inasmuch as he is the agent of the mortgagor as well as mortgagee, and is chargeable for any failure to obtain the full rental value of the premises only on the same grounds that an agent would be.[6] If the grantee has good reason to consider himself possessed of an absolute estate in the land, and he consequently makes permanent improvements, he will be entitled to allowance for these when a mortgagee generally would not be entitled to such allowance.[7]

But ordinarily the same rules for accounting are held to apply in such case; the mortgagee is compelled to account for the rents and profits, and he may be allowed for necessary and proper repairs, but not for costly improvements, unless these be made with

[1] Freytag *v.* Hoeland, 23 N. J. Eq. 36.

[2] Merriam *v.* Goss, 139 Mass. 77.

[3] Bagnall *v.* Villar, L. R. 12 Ch. D. 812; Gilman *v.* Wills, 66 Me. 273, and cases cited; Reed *v.* Elwell, 46 Me. 270.

[4] Marden *v.* Jordan, 65 Me. 9.

[5] Leeds *v.* Gifford, 41 N. J. Eq. 464.

[6] Barnard *v.* Jennison, 27 Mich. 230; Clark *v.* Finlon, 90 Ill. 245.

[7] Wasatch Min. Co. *v.* Jennings (Utah), 15 Pac. Rep. 65, 73, quoting text; Harper's Appeal, 64 Pa. St. 315.

"There is a manifest distinction," says Judge Sharswood, "between the two cases in reason and justice, which are controlling guides in a court of equity, where no positive rule of law intervenes." The cases in Pennsylvania are reviewed, and the law on this point clearly stated.

the mortgagor's consent, however beneficial they may be. But if such improvements are made in good faith on the part of the mortgagee, under the belief that he owns the property absolutely, he may be allowed for them.[1]

1118. A mortgagee is equally liable to account whether his possession be before or after the law day, unless there is some agreement to the contrary.[2] An equitable mortgagee is under the same obligation to account that a legal mortgagee is.[3] Where redemption is allowed after a foreclosure sale, if the mortgagee purchases and enters into possession he must account for the rents and profits.[4] He is not allowed to claim that his possession was unlawful.[5]

A mortgagee who has entered into possession and received the rents and profits of the mortgaged premises, and afterwards purchased the equity of redemption, is still liable, so far as a subsequent mortgagee is concerned, to account for the rents and profits of the premises received while he occupied as mortgagee. When the second mortgagee applies to redeem a prior mortgage he stands in the same position as the mortgagor, and is bound to pay no greater sum than the mortgagor would pay.[6]

A mortgagee in possession who holds possession by virtue of any other title, such as his tenancy by the curtesy, or by prior purchase, is not chargeable with rents and profits during the time he holds the property by that title.[7]

A mortgagee in possession after default is presumed to be in possession in his character of mortgagee, and as such to be liable to account for rents and profits; and such is the presumption although he first occupied as a tenant for a fixed term, and while so occupying purchased the mortgage, and remained in possession after the expiration of his term; he is presumed to be in occupation as a mortgagee, and not as a tenant holding over.[8]

The mortgagee must account for the rents and profits received

[1] Cookes *v.* Culbertson, 9 Nev. 199.

[2] Davis *v.* Lassiter, 20 Ala. 561; Ross *v.* Boardman, 22 Hun (N. Y.), 527.

[3] Brayton *v.* Jones, 5 Wis. 117.

[4] Ten Eyck *v.* Casad, 15 Iowa, 524; and see Hill *v.* Hewett, 35 Iowa, 563; Blain *v.* Rivard, 19 Ill. App. 477.

[5] Renshaw *v.* Taylor, 7 Oreg. 315.

[6] Harrison *v.* Wyse, 24 Conn. 1.

[7] Hart *v.* Chase, 46 Conn. 207; Van Duyne *v.* Shann, 41 N. J. Eq. 312.

[8] Anderson *v.* Lanterman, 27 Ohio St. 104; Moore *v.* Degraw, 5 N. J. Eq. (1 Halst.) 346; Hilliard *v.* Allen, 4 Cush. (Mass.) 532.

Possession by the husband of the mortgagee, under an agreement between him and the supposed owner, does not enable the mortgagor to offset the rent against the mortgage debt. Sanford *v.* Pierce, 126 Mass. 146.

by him after a decree of strict foreclosure upon a redemption within the time allowed by the decree.[1] If a mortgagee enters into possession under a defective foreclosure, he is in the position of a mortgagee in possession, and is entitled to the crops and other products of the land, and is accountable for the rents and profits.[2] A purchaser at a foreclosure sale, which is defective by reason that a junior mortgagee was not made a party to the bill, must account for the rents and profits upon a subsequent redemption by the latter, if such sale operates merely as an assignment of the mortgage;[3] but if it operates not only as an assignment of the prior mortgage, but as a foreclosure of the equity of redemption subject to the junior mortgage, the purchaser standing in the place of the mortgagor or owner of the premises is not liable to account for the rents and profits.[4] If the junior mortgagee wishes to secure these, he must obtain the appointment of a receiver upon showing the insufficiency of his security.[5]

1119. An assignee stands in the place of his assignor in respect to the account, whether he be an assignee of the mortgage or of the equity of redemption. The mortgagee's liability to account to the mortgagor for the rents and profits, less the amount paid for taxes and repairs, attaches to the assignee of the mortgage, and the assignee of the mortgagor acquires the rights of the latter in this respect.[6] A transfer of the equity of redemption while the mortgagee is in possession necessarily carries with it to the purchaser the right to an account for the rents and profits of the premises, as an incident to the right of redemption, both those received by the mortgagee before the sale and those received afterwards.[7]

When a mortgagee in possession assigns a mortgage, the mortgagor, having no actual notice of the assignment, is entitled as against the assignee to an account of the rents and profits up to the time of recording the assignment, and to have them applied on the mortgage debt.[8]

1120. So long as the mortgagee refrains from taking pos-

[1] Ruckman *v.* Astor, 9 Paige (N. Y.), 517; Dailey *v.* Abbott, 40 Ark. 275. See Chapman *v.* Smith, 9 Vt. 153.

[2] Holton *v.* Bowman, 32 Minn. 191; Johnson *v.* Sandhoff, 30 Minn. 197.

[3] Ten Eyck *v.* Casad, 15 Iowa, 524.

[4] Catterlin *v.* Armstrong, 79 Ind. 514, quoting text.

[5] Renard *v.* Brown, 7 Neb. 449.

[6] Strang *v.* Allen, 44 Ill. 428.

[7] Ruckman *v.* Astor, *supra;* and see Gelston *v.* Thompson, 29 Md. 595.

[8] Ackerson *v.* Lodi Branch R. R. Co. 31 N. J. Eq. 42.

session, he has no right to the rents and profits received by the mortgagor or any one under him; and although there has been a breach of the condition, the owner of the equity of redemption cannot be called upon to account.[1] He may redeem without paying rent, even when he has been allowed to remain in possession under an agreement to pay to the mortgagee a stipulated rent, because the mortgage does not secure the rent. The agreement to pay this is merely personal.[2]

Although the mortgagor has covenanted in his mortgage to surrender the premises upon default, but when a default occurs he refuses to surrender, and drives the mortgagee to an action to recover possession, the latter is not entitled to the rents and profits until he acquires actual possession.[3]

A husband joined his wife to release his curtesy in a mortgage of his wife's separate real estate. The wife having died the husband married again, and the second wife took an assignment of the mortgage. Upon a bill to redeem by the heirs of the mortgagor, it was held that they could not redeem without paying interest for the time the husband held the estate as tenant for life. "He was not legally liable upon the debt secured, and, as between himself and his wife, the assignee of the mortgage, he was under no obligation to pay it, or the interest upon it. . . . By redeeming the mortgage, the heirs might at any time have put themselves in a position to enforce payment of interest by the life tenant, and to save themselves from risk of loss by his neglect."[4]

When the mortgaged premises have been devised by an insolvent owner to the mortgagee, and he has entered as devisee, the creditors of the estate have the right to demand an account from him of the rents and profits.[5]

A mortgagor in possession is not bound to rebuild structures destroyed by fire,[6] or to repair the premises when they have been injured without his default.[7]

[1] Colman *v.* St. Albans, 3 Ves. Jun. 25; Higgins *v.* York Buildings Co. 2 Atk. 107; Drummond *v.* St. Albans, 5 Ves. Jun. 433, 438; Hele *v.* Bexley, 20 Beav. 127; Johnson *v.* Miller, 1 Wils. (Ind.) 416; Butler *v.* Page, 7 Met. (Mass.) 40, 42; Greer *v.* Turner, 36 Ark. 17.

[2] Merritt *v.* Hosmer, 11 Gray (Mass.), 276; and see Chase *v.* Palmer, 25 Me. 341; Davenport *v.* Bartlett, 9 Ala. 179; Gilman *v.* Wills, 66 Me. 273.

[3] Teal *v.* Walker, 111 U. S. 242.

[4] Martin *v.* Martin (Mass.), 16 N. E. Rep. 413.

[5] Chalabre *v.* Cortelyou, 2 Paige (N. Y.), 605.

[6] Reid *v.* Bank of Tenn. 1 Sneed (Tenn.), 262.

[7] Campbell *v.* Macomb, 4 Johns. (N. Y.) Ch. 534.

II. *What the Mortgagee is chargeable with.*

1121. A mortgagee allowing the mortgagor to remain in occupation after the former has taken possession for the purpose of foreclosure does not necessarily render himself accountable for rents and profits. If the mortgagor is permitted to remain in occupation, and to take the profits, of course the mortgagee is not accountable for them to him;[1] nor has a second mortgagee in such case any claim upon the first mortgagee to account after formal possession taken by the former. The second mortgagee may take possession as against the mortgagor if the latter holds in his own right, and thus exclude him and take the rents and profits to his own use. If the first mortgagee should by previous entry and actual occupation, or by virtue of his superior title, prevent the second mortgagee from making entry, then he would be held to account, in favor of the second mortgagee, for the rents and profits.[2] A second mortgagee has also the full power in any case to protect himself, by paying off the first mortgage and taking entire control of the mortgaged premises. The taking of formal possession and the recording of the certificate in the registry of deeds does not estop the first mortgagee to show that he was not in actual possession, nor does his formal entry imply a continued possession under such entry; and if a second mortgagee would charge the first with the rents and profits, he should attempt to enter under his own mortgage, or should tender the debt due to the first mortgagee.[3]

As against a purchaser from the mortgagor, the mortgagee has no right to allow any one, as, for instance, the widow of the mortgagor, to occupy the premises or any part of them without paying rent. He is liable to account for the whole profits of the estate, after allowing a reasonable time to gain possession by legal process.[4]

A mortgagee is not accountable to a subsequent incumbrancer or purchaser for the rent of a house of which he has taken formal possession for the purpose of foreclosure, when the house is occu-

[1] Reynolds *v.* Canal & Banking Co. of N. O. 30 Ark. 520; White *v.* Maynard, 54 Vt. 575.

[2] Coppring *v.* Cooke, 1 Vern. 270; Demarest *v.* Berry, 16 N. J. Eq. 481; Hitchcock *v.* Fortier, 65 Ill. 239; Watford *v.* Oates, 57 Ala. 290; White *v.* Maynard, *supra.*

[3] Bailey *v.* Myrick, 52 Me. 132; Charles *v.* Dunbar, 4 Met. (Mass.) 498. See, also, Dawson *v.* Drake, 30 N. J. Eq. 601.

[4] Thayer *v.* Richards, 19 Pick. (Mass.) 398; Butts *v.* Broughton, 72 Ala. 294.

pied under a claim of right adversely to him; as, for instance, when occupied by the mortgagor and his family under a homestead right not released in the mortgage.[1] But if the mortgagor has a right of homestead in a part of the mortgaged premises, which right he has released in a first mortgage but not in a second, the first mortgagee, having taken actual possession for the purpose of foreclosure, and allowed the mortgagor to occupy the homestead, is accountable to the second mortgagee for the rent he might have obtained for the homestead.[2]

If one who is a prior mortgagee afterwards acquires the equity of redemption subject to a second mortgage, and then takes possession, he is not regarded as a mortgagee in possession, and as such accountable for the rents and profits to the junior mortgagee.[3]

1122. Where the mortgagee has himself occupied and improved the estate in person, the value of the occupation must necessarily be determined by evidence of experts as to what ought to have been received for the rent of the property;[4] and such evidence is also admissible in cases where the mortgagee, not being himself in possession, has kept false accounts or no accounts of rents received, or there is such misconduct of any kind on his part as makes a resort to this kind of evidence necessary. But the mere fact that the mortgagee resides at a distance, and must rely upon agents to manage the estate, should not make evidence of experts that a higher rent could have been received admissible to charge him with a greater amount of rent than he has received.[5]

If a mortgagee himself occupies the premises, especially if they consist of a farm under cultivation, upon which labor and money must be bestowed to produce annual crops, he will be charged with such sums as will be a fair rent of the premises, without regard to what he may realize as profits from the use of it.[6] The expenditures necessary to carry on a farm, and the profits derived

[1] Taft *v.* Stetson, 117 Mass. 471; Silloway *v.* Brown, 12 Allen (Mass.), 30.

[2] Richardson *v.* Wallis, 5 Allen (Mass.), 78.

[3] Rogers *v.* Herron, 92 Ill. 583.

[4] Smart *v.* Hunt, 1 Vern. 418; Trulock *v.* Robey, 15 Sim. 265; Johnson *v.* Miller, 1 Wils. (Ind.) 416; Montgomery *v.* Chadwick, 7 Iowa, 114; Moore *v.* Degraw, 5 N. J. Eq. (1 Halst.) 346; Van Buren *v.* Olmstead, 5 Paige (N. Y.), 9; Barnett *v.* Nelson, 54 Iowa, 41; Murdock *v.* Clarke, 59 Cal. 683, quoting text; Dozier *v.* Mitchell, 65 Ala. 511.

[5] Gerrish *v.* Black, 104 Mass. 400.

[6] Equitable Trust Co. *v.* Fisher, 106 Ill. 189; Engleman Trans. Co. *v.* Longwell, 2 Flip. 601; Still *v.* Buzzell, 60 Vt. 478.

from it, are so wholly within the knowledge of the occupant that it would be impossible for the mortgagor to show the account to be wrong, except in the result.[1]

Where a mortgagee of an undivided half of property enters into a partnership with the owner of the other half interest for the use of the property as a mill, he will be charged with a fair rental, though the business turns out disastrously.[2]

What is a reasonable rent is a matter to be determined from a consideration of all the circumstances of the case. The price that might be obtained by a letting at public auction is not necessarily a proper criterion; for in many cases such a rent would be no just standard of the real value of the rent.

1123. As a general rule the mortgagee in possession is held to the exercise of such care and diligence as a provident owner in charge of the property would exercise; but he will not be held accountable for anything more than the actual rents and profits received, unless there has been wilful default or gross negligence on his part.[3] It is the fault of the mortgagor that he lets the land fall into the hands of the mortgagee, and the mortgagor should be required to prove actual fraud or negligence on the part of the mortgagee before he can be charged for more than his actual receipts of rents and profits.

He will not be held to account according to the value of the property, but for what he should with reasonable care and attention have received.[4] Neither is he required to enter into any speculations for the benefit of the mortgagor,[5] but to protect the

[1] Sanders *v.* Wilson, 34 Vt. 318.

[2] Engleman Trans. Co. *v.* Longwell, 2 Flip. 601.

[3] Parkinson *v.* Hanbury, L. R. 2 H. of Lords, 1; Hughes *v.* Williams, 12 Ves. 493; Peugh *v.* Davis, 4 Mack. (D. C.) 23; *S. C.* 113 U. S. 542; Engleman Trans. Co. *v.* Longwell, *supra;* Shaeffer *v.* Chambers, 6 N. J. Eq. (2 Halst.) 548; Walsh *v.* Rutgers Fire Ins. Co. 13 Abb. (N. Y.) Pr. 33; Barron *v.* Paulling, 38 Ala. 292; Milliken *v.* Bailey, 61 Me. 316; Van Buren *v.* Olmstead, 5 Paige (N. Y.), 9; Quinn *v.* Brittain, 3 Edw. (N. Y.) 314; Moore *v.* Titman, 44 Ill. 367; Strang *v.* Allen, Ib. 428; Harper *v.* Ely, 70 Ill. 581; Mosier *v.* Norton, 83 Ill. 519; *S. C.* 100 Ill. 63; Clark *v.* Finlon, 90 Ill. 245; Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242; Dawson *v.* Drake, 30 N. J. Eq. 601; Dozier *v.* Mitchell, 65 Ala. 511; Magnusson *v.* Charleson, 9 Ill. App. 194; Gretham *v.* Ware, 79 Ala. 192; Pinneo *v.* Goodspeed (Ill.), 12 N. E. Rep. 196; Donahue *v.* Chease, 139 Mass. 407; Ely *v.* Turpin, 75 Mo. 86; Turner *v.* Johnson (Mo.), 7 S. W. Rep. 570; Butts *v.* Broughton, 72 Ala. 294; Comstock *v.* Michael, 17 Neb. 288.

[4] Murdock *v.* Clarke, 59 Cal. 683, quoting text; Peugh *v.* Davis, *supra.*

[5] Hughes *v.* Williams, 12 Ves. 493; Rowe *v.* Wood, 2 J. & W. 553, in relation to working a mine.

property as it is, and to obtain from it what returns it will yield under prudent management.

If the mortgagee suffers a notoriously insolvent tenant to remain in possession, he is accountable for the rent during such time, deducting the time reasonably necessary to expel him by legal means, and to obtain a responsible tenant.[1] It is wilful default on the part of the mortgagee to allow a tenant to remain in possession several years without paying rent, and without any demand upon him for it.[2] He may also render himself liable for the rents and profits by assigning the premises to an insolvent person, and putting him in possession.[3] A mortgagee is liable for rent lost or not collected through the wilful or gross negligence of his agent, although ordinary and proper care was exercised in the selection of the agent.[4]

If he has lost rent which he should have received, as, for instance, by refusing a higher rent from a responsible tenant, or by turning out without sufficient cause a responsible tenant, and then getting less rent or none at all, he is chargeable with the rent lost. If the mortgagor is aware that a higher rent may be obtained, he should inform the mortgagee of the fact; and his neglect to do so may prevent his charging the mortgagee with such higher rent.[5] But when the mortgagee, in the exercise of a reasonable discretion and care, has already agreed upon the terms of a lease, he is not chargeable with a higher rent for the reason that the mortgagor or any one else offers a higher rent.[6]

A qualification of the general rule arises when one goes into possession under a deed absolute in form, and the circumstances are such that he may well believe himself to be in fact the owner of the estate, subject only to an agreement to sell. Such a grantee is not technically a mortgagee in possession. The character of mortgagee is cast upon him by the application of equitable rules to an oral agreement in contradiction of the deed, and when, perhaps, the transaction might be construed as a conditional sale. In such case the mortgagee is chargeable only

[1] Miller *v.* Lincoln, 6 Gray (Mass.), 556; Greer *v.* Turner, 36 Ark. 17.

[2] Brandon *v.* Brandon, 10 W. R. 287.

[3] Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270.

[4] Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242.

[5] Hughes *v.* Williams, 12 Ves. 493; Montague *v.* Boston & Albany R. R. Co. *supra.*

[6] Hubbard *v.* Shaw, 12 Allen (Mass.), 120; Montague *v.* Boston & Albany R. R. Co. *supra;* Moshier *v.* Norton, 100 Ill. 63.

with what he has received, and not with what he might have received.[1]

It has been suggested that when the mortgagee is unable to procure a tenant for a large farm, it may be his duty to cause it to be tilled in accordance with good ordinary husbandry.[2]

A mortgagee having properly rented the premises to a tenant is not accountable for damages done to the estate without his knowledge, or for wood cut and used on the premises for firewood by such tenant.[3]

But the mortgagee must account for waste committed while he is personally in possession.[4] When the security is insufficient, he will not be enjoined from cutting timber or opening a mine. So long as he does not commit wanton destruction, he may also clear and cultivate the land.[5] He is entitled to make the most of the property for the purpose of realizing what is due to him. He has only to account for the proceeds of the property.[6]

1124. If the mortgagee has kept no proper accounts of the rents and profits received by him, he is chargeable with what he might have received, and must be presumed to have received, by the use of ordinary care.[7] If the mortgagee be unable to render an account, he is chargeable with a fair occupying rent.[8]

The account must include all rents received from the time of the mortgagee's entry into possession.[9] Although redemption is sought by one having only a limited interest in the property, as, for instance, a right of dower, the mortgagee is liable to account not merely from the time of the demand upon him, but from the date of his entry.[10]

1125. A mortgagee may work a mine upon the mortgaged

[1] Parkinson *v.* Hanbury, L. R. 2 H. L. 1; Morris *v.* Budlong, 78 N. Y. 543; Moore *v.* Cable, 1 Johns. (N. Y.) Ch. 384; Harper's Appeal, 64 Pa. St. 315.

[2] Shaeffer *v.* Chambers, 6 N. J. Eq. (2 Halst.) 548.

[3] Hubbard *v.* Shaw, 12 Allen (Mass.), 120; Onderdonk *v.* Gray, 19 N. J. Eq. 65.

[4] Sandon *v.* Hooper, 6 Beav. 246; Hornby *v.* Matcham, 16 Sim. 325; Midleton *v.* Eliot, 15 Sim. 531; Onderdonk *v.* Gray, 19 N. J. Eq. 65; Daniel *v.* Coker, 70 Ala. 260.

[5] Morrison *v.* M'Leod, 2 Ired. Eq. (N. C.) 108.

[6] Millett *v.* Davey, 31 Beav. 470, per Romilly, M. R.

[7] Dexter *v.* Arnold, 2 Sumn. 108; Van Buren *v.* Olmstead, 5 Paige (N. Y.), 9; Frey *v.* Campbell (Ky.), 3 S. W. Rep. 368.

[8] Montgomery *v.* Chadwick, 7 Iowa, 114; Gordon *v.* Lewis, 2 Sumn. 143, 150; Clark *v.* Smith, 1 N. J. Eq. (Sax.) 121.

[9] Lupton *v.* Almy, 4 Wis. 242; Ackerman *v.* Lyman, 20 Wis. 454; Reynolds *v.* Canal & Banking Co. of N. O. 30 Ark. 520.

[10] Dela *v.* Stanwood, 62 Me. 574.

property, if the work be carried on in a proper manner.[1] Of course the product, less the expense of working it, must be applied to the payment of the mortgage debt. But he would not be justified in improving a mine by a large expenditure, or at most to advance more for this purpose than would a prudent owner.[2] A mortgagee may even open a new mine when the mortgaged estate is of insufficient value aside from the mine; and he is chargeable with only the net profits of working it.[3] But if the property is otherwise sufficient, the mortgagee has no right to open and work mines, and, if he does so, will be charged with the gross receipts, without any allowance for the expenses of working.[4]

III. *Allowances for Repairs and Improvements.*

1126. The rule as to repairs. — Until foreclosure, the mortgagee, although in possession for the purpose of foreclosing, is not the owner of the property, but beyond securing payment of the debt due him is really in the position of trustee for the owner. He has no authority to make the estate better at the expense of the mortgagor, but is bound to use reasonable means to preserve the estate from loss and injury. He cannot charge the mortgagor with expenditures for convenience or ornament. The rule is sometimes stated to be that the mortgagee must preserve the estate in as good a condition as that in which he received it. But he may properly, under some circumstances, go beyond this, and supply things that were wanting at the time of entry; as where the doors or windows of a house are gone, he is justified in supplying these in order to put the estate in condition for occupation.[5] What is a proper expenditure must depend upon the circumstances of each case. If the estate be a valuable one, handsomely laid out, with many young fruit and ornamental trees, and the mortgagee cannot by reasonable efforts let it for a sum sufficient to keep it in proper repair and preserve the fruit-trees, he may be allowed the expenses necessary to keep it in such repair; but not for expenditures in cultivating the land, or for money paid for a horse and cart and cow.[6]

[1] Irwin *v.* Davidson, 3 Ired. (N. C.) Eq. 311.

[2] Rowe *v.* Wood, 2 J. & W. 553.

[3] Millett *v.* Davey, 31 Beav. 470.

[4] Millett *v.* Davey, *supra;* and see Hood *v.* Easton, 2 Giff. 692; *S. C.* 2 Jur. N. S. 729.

[5] Woodward *v.* Phillips, 14 Gray (Mass.), 132; Rowell *v.* Jewett, 73 Me. 365.

[6] Sparhawk *v.* Wills, 5 Gray (Mass.), 423.

The mortgagee in possession is bound to make all reasonable and necessary repairs, and is responsible for loss occasioned by his wilful default or gross neglect in this respect.[1] What are reasonable and necessary repairs depends upon the particular circumstances of the case.[2] He is not to be charged with exactly the same degree of care that a person in possession of his own property would ordinarily take.[3] He is not bound to go further than to keep the estate in necessary repair; or to make full and complete repairs if he would thereby incur expense disproportionate to the value of the estate or to his own mortgage interest. He is not even bound to repair defects arising in the ordinary way by waste and decay.

1127. The ordinary rule in respect to improvements is that the mortgagee will not be allowed for them further than is proper to keep the premises in necessary repair. The improvements may be of permanent benefit to the estate; but unless made with the consent and approbation of the mortgagor, no allowance can be made for them.[4] The mortgagee has no right to impose them upon the owner, and thereby increase the burden of redeeming. The improvements will enure to the benefit of the estate upon redemption, but in the mean time the mortgagee has the use of them. It is his own choice to make them while he holds only a defeasible title. A default having occurred, he can, except in those states where mortgages other than those having powers of sale must be foreclosed by entry and possession, by a foreclosure suit, either sell the property to another, or buy it himself and hold it absolutely.

But while the mortgagee in possession is not allowed to charge for lasting improvements, he is not on the other hand chargeable

[1] Barnett *v.* Nelson, 54 Iowa, 41; Dozier *v.* Mitchell, 65 Ala. 511, quoting text.

[2] Dexter *v.* Arnold, 2 Sumn. 108; McCumber *v.* Gilman, 15 Ill. 381.

[3] Shaeffer *v.* Chambers, 6 N. J. Eq. (2 Halst.) 548.

[4] Harper's Appeal, 64 Pa. St. 315; Russell *v.* Blake, 2 Pick. (Mass.) 505; Clark *v.* Smith, 1 N. J. Eq. (Sax.) 121; Bell *v.* Mayor of N. Y. 10 Paige (N. Y.), 49; Quin *v.* Brittain, Hoff. (N. Y.) 353, 354; Moore *v.* Cable, 1 Johns. (N. Y.) Ch. 385, per Chancellor Kent; Mickles *v.* Dillaye, 17 N. Y. 80, per Denio, J.; Wetmore *v.* Roberts, 10 How. (N. Y.) Pr. 51; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Neale *v.* Hagthrop, 3 Bland (Md.) Ch. 551, 590; Dougherty *v.* McColgan, 6 G. & J. (Md.) 275; McCarron *v.* Cassidy, 18 Ark. 34; Hidden *v.* Jordan, 28 Cal. 301; *S. C.* 32 Cal. 397; Murdock *v.* Clarke, 59 Cal. 683; Lowndes *v.* Chisholm, 2 McCord (S. C.) Ch. 455; Ruby *v.* Abyssian Soc. of Portland, 15 Me. 306; Hopkins v. Stephenson, 1 J. J. Marsh. (Ky.) 341; Morgan *v.* Walbridge, 56 Vt. 405; Dozier *v.* Mitchell, *supra;* American Button-Hole Co. *v.* Burlington Mut. Loan Asso. 68 Iowa, 326.

with the increased rents and profits which are directly traceable to such improvements made by him.[1] If, however, improvements be made by a third person in possession in his own wrong, they enure to the benefit of the mortgagor, and a mortgagee upon entry is chargeable with the rents arising from such improvements.[2] Such would also be the case if the improvements are made by the mortgagor. But the mortgagee is not otherwise responsible for improvements made by the mortgagor, either to him or to mechanics furnishing labor or material without the mortgagee's direction.[3]

1128. Exception to the rule. — When the mortgagee makes permanent improvements, supposing he has acquired an absolute title by foreclosure, upon a subsequent redemption he is allowed the value of them,[4] especially if the mortgagor has by his actions to any extent favored the mistaken belief.[5]

In like manner a purchaser at a foreclosure sale, who has made valuable improvements in the belief that he has acquired an absolute title, is entitled to be paid for them in case the premises are redeemed.[6] Such a purchaser, when the equity of redemption has not been cut off by the sale, is in fact an assignee of the mortgage title. In like manner a purchaser in good faith from the mortgagee in possession, and with the assurance that he gave a perfect title, is entitled to allowance for improvements made by him thereon, although these consist of new structures.[7] Such purchaser may remove improvements made by him, if he can do this without injury to the premises; and in that case he cannot recover the value from the person who redeems, nor can he be com-

[1] Moore *v.* Cable, 1 Johns. (N. Y.) Ch. 385; Bell *v* Mayor of N. Y. 10 Paige (N. Y.), 49; Raynor *v.* Raynor, 21 Hun (N. Y.), 36; Clark *v.* Smith, 1 N. J. Eq. (Sax.) 121, 138; and see Morrison *v.* M'Leod, 2 Ired. (N. C.) Eq. 108; Catterlin *v.* Armstrong, 79 Ind. 514, 523.

[2] Merriam *v.* Barton, 14 Vt. 501.

[3] Holmes *v.* Morse, 50 Me. 102; Childs *v.* Dolan, 5 Allen (Mass.), 319.

[4] Miner *v.* Beekman, 50 N. Y. 337; Putnam *v.* Ritchie, 6 Paige (N. Y.), 390; Wetmore *v.* Roberts, 10 How. (N. Y.) Pr. 51; Fogal *v.* Pirro, 17 Abb. (N. Y.) Pr. 113; *S. C.* 10 Bosw. 100; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Troost *v.* Davis, 31 Ind. 34; Roberts *v.* Fleming, 53 Ill. 196, 198; Gillis *v.* Martin, 2 Dev. (N. C.) Eq. 470; Poole *v.* Johnson, 62 Iowa, 605; American Button-Hole Co. *v.* Burlington Mut. Loan. Asso. 68 Iowa, 326.

[5] Bacon *v.* Cottrell, 13 Minn. 194; Hadley *v.* Stewart, 65 Wis. 481.

[6] Green *v.* Dixon, 9 Wis. 532; Green *v.* Wescott, 13 Wis. 606; Bacon *v.* Cottrell, *supra;* Barnard *v.* Jennison, 27 Mich. 230; Vanderhaise *v.* Hugues, 13 N. J. Eq. 410; Harper's Appeal, 64 Pa. St. 315; Freichnecht *v.* Meyer, 39 N. J. Eq. 551.

[7] McSorley *v.* Larissa, 100 Mass. 270; Mickles *v.* Dillaye, 17 N. Y. 80; and see Miner *v.* Beekman, 50 N. Y. 337, 345; Bright *v.* Boyd, 1 Story, 478.

pelled to account to him for the rents and profits arising from such improvements.[1]

The mortgagee may also be allowed for improvements when he has been in possession for a long period, and the mortgagor, knowing that the improvements were going on, interposed no objection.[2] And when he is allowed for the improvements he is chargeable with the rent on the property as improved, and not as it was exclusive of the improvements.[3]

1129. Allowance for repairs. — Though not bound to make permanent repairs, it is quite another question whether the mortgagee may not claim an allowance for proper expenditures for permanent repairs for the benefit of the estate.[4] The rule undoubtedly is that he may charge the cost of permanent improvements so far as they are necessary and beneficial to the estate,[5] and the mortgagee will not be held to prove their absolute necessity.[6] All necessary repairs made by a mortgagee in possession should be allowed for in his accounts.[7] The fact that the necessary repairs of the premises exceed in cost the amount of the rents and profits is no objection to their allowance.[8] Neither is there any objection to an allowance for repairs of such sums as the master, in stating the account, has found to be reasonable, and to have been actually paid, although the mortgagee is unable to give dates and items of all the repairs.[9]

But repairs which are demanded merely for the purpose of ornament or comfort while the mortgagee himself occupies the premises, and are not of any substantial benefit to the realty, will not be allowed.[10] And so also charges for new buildings or structures which are not necessary for the preservation of the estate should not be allowed.[11]

[1] Poole *v.* Johnson, 62 Iowa, 611.

[2] Montgomery *v.* Chadwick, 7 Iowa, 114; Roberts *v.* Fleming, 53 Ill. 196, 204; Morgan *v.* Walbridge, 56 Vt. 405.

[3] Montgomery *v.* Chadwick, *supra;* Dozier *v.* Mitchell, 65 Ala. 511.

[4] Bollinger *v.* Chouteau, 20 Mo. 89.

[5] Boston Iron Co. *v.* King, 2 Cush. (Mass.) 400; Reed *v.* Reed, 10 Pick. (Mass.) 398, 400; Merriam *v.* Goss, 139 Mass. 77; Wells *v.* Van Dyke, 109 Pa. St. 330.

[6] Wells *v.* Van Dyke, *supra;* Harper's Appeal, 64 Pa. St. 315.

[7] Sandon *v.* Hooper, 6 Beav. 246; Neesom *v.* Clarkson, 4 Hare, 97; Harper's Appeal, 64 Pa. St. 315; Adkins *v.* Lewis, 5 Oreg. 292; Strong *v.* Blanchard, 4 Allen (Mass.), 538; Hosford *v.* Johnson, 74 Ind. 479; Johnson *v.* Hosford (Ind.), 12 N. E. Rep. 522.

[8] Reed *v.* Reed, *supra.*

[9] Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242.

[10] Madison Av. Church *v.* Oliver St. Church, 41 Superior Ct. (N. Y.) 369.

[11] Reed *v.* Reed, *supra;* Russell *v.* Blake, 2 Pick. (Mass.) 505; Wells *v.* Van Dyke, *supra.*

Where the property is a mill, the mortgagee may be allowed for improved machinery upon proof that it was necessary in order to run the mill in successful competition with other mills which contained similar improved machinery.[1]

1130. If the mortgagee so intermingles the mortgaged property with his own that it is impracticable to ascertain how much of certain charges ought to be borne by the mortgaged estate, he will not be allowed anything in respect of such charges.[2]

1131. A mortgagee in possession of a church edifice, and using it, with the consent of the mortgagor, for religious services, upon accounting was charged with the actual receipts from pew rents, but was not allowed for the expenses of conducting religious services. There seems to have been no proof offered that the pew rents were paid in consideration of the preaching, the music, with the adjuncts of light and warmth, and the services of the sexton; and it was suggested that they may have been paid for the privilege of assembling for the performance of religious services, and for the advantage of the Sunday-school and the lecture room. In the absence of proof, it was held that there was no presumption that the preaching, the music, and the like, were the consideration for which the rents were paid, and that the mortgagee should be charged with all the pew rents received, and should be allowed nothing for maintaining services.[3] But upon appeal this decision was reversed, and it was held that the mortgagee should be allowed to offset against the pew rents the expenses of maintaining and keeping up the church and the services therein.[4]

IV. *Allowance for Compensation.*

1132. A mortgagee in possession is not entitled to compensation for his own trouble in taking care of the estate and renting it, although there is an agreement between him and the mortgagor that he shall have such compensation.[5] The reason given for this rule is, that to allow such compensation would tend

[1] Wells *v.* Van Dyke, 109 Pa. St. 330.

[2] Elmer *v.* Loper, 25 N. J. Eq. 475.

[3] Madison Av. Church *v.* Oliver St. Church, 41 Superior Ct. (N. Y.) 369, 420.

[4] Madison Av. Church *v* Oliver St. Church, 73 N. Y. 82.

[5] French *v.* Baron, 2 Atk. 120; Bonithon *v.* Hockmore, 1 Vern. 316; Godfrey *v.* Watson, 3 Atk. 517, 518; Eaton *v.* Simonds, 14 Pick. (Mass.) 98; Clark *v.* Smith, 1 N. J. Eq. (Sax.) 121, 137; Elmer *v.* Loper, *supra;* Moore *v.* Cable, 1 Johns. (N. Y.) Ch. 385, 388.

directly to facilitate usury and oppression.[1] And moreover the care he bestows is for the furtherance and protection of his own interests, being not an agent, but for the time, as it were, the owner.[2] But he may charge for the services of an agent employed by him to collect rents, when a prudent owner acting for himself would probably have done so.[3]

If a mortgagor agrees and consents, with a knowledge of all the facts and circumstances, to disbursements made by the mortgagee in possession, these are to be deemed reasonable and must be reimbursed; and the fact that the mortgagor or his agent agreed to the employment by the mortgagee for a time of a person to take charge of the mortgaged estate, at a certain rate of compensation, is competent though not conclusive evidence that the same compensation should be allowed during the residue of the term of the mortgagee's possession.[4]

It may be noticed in this connection that in the early cases a mortgagee in possession was regarded as a trustee, who was not then entitled to commissions. This rule has been changed as regards trustees, and there is no reason why it should be retained as regards mortgagees in possession. The tendency in recent cases is evidently in the direction of a change in this rule.[5]

1133. In Massachusetts, as a general rule, the mortgagee in possession is allowed as compensation for managing the property five per cent. of the rents collected, though, if it were found that the services were actually worth more, the rule is not so fixed as to prevent a further allowance.[6] Therefore in a case where a master, in stating an account between the mortgagor and mort-

[1] Scott *v.* Brest, 2 T. R. 238; Turner *v.* Johnson (Mo.), 7 S. W. Rep. 570.

[2] Benham *v.* Rowe, 2 Cal. 387; Turner *v.* Johnson, *supra.*

[3] Davis *v.* Dendy, 3 Madd. 170; Harper *v.* Ely, 70 Ill. 581.

[4] Cazenove *v.* Cutler, 4 Met. (Mass.) 246.

[5] Green *v.* Lamb, 24 Hun (N. Y.), 87. Learned, P. J., said: "We are of opinion that no fixed rule should be laid down which would apply to every case where there is the legal relation existing between mortgagee in possession and owner. The circumstances which cause the relation may differ widely, and may make different rules as to commissions just and proper."

In the case before the court the mortgagee had entered with the consent of the mortgagor before default; and his receipt of the rents and profits was partly at least to pay the debt owing him. It was observed by the court that in this respect the case was unlike the Massachusetts cases noticed in the next section, where the entry was either for the purpose of foreclosure or after breach of the condition.

[6] Gerrish *v.* Black, 104 Mass. 400; Gibson *v.* Crehore, 5 Pick. 146; Tucker *v.* Buffum, 16 Pick. 46; Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242.

gagee, reported that he was satisfied that such commission would not compensate the mortgagee for his trouble, the court recommitted the report with directions to allow such further sum as he might think just and reasonable.[1] The question of compensation is peculiarly within the discretion of the master to whom the bill in equity is referred to state the account.[2] But the mortgagee cannot usually charge a commission on the amount expended in repairs and improvements. In Connecticut, also, a mortgagee in possession is entitled to charge for his services in renting them and collecting rents, and for such sums as were necessarily expended to obtain possession of the property.[3]

In determining the amount of compensation to be made to the mortgagee, reference should be had to the nature and condition of the property, and to the provisions made in the mortgage itself for such compensation.[4]

V. *Allowances for Disbursements.*

1134. Taxes paid by the mortgagee on the mortgaged premises, either before or after he has taken possession, must be repaid upon redemption. Under the provisions of the mortgage, the taxes, when paid by him, usually become a lien under the mortgage.[5] But even when this is not the case, the payment being made to preserve his security, he is entitled to recover the amount paid, and may even have a preference to this extent over prior incumbrancers whose liens the payment has served to protect.[6] The same is true of any assessment made by authority for public purposes, and which is by law a primary lien upon the property.[7]

There is no obligation resting upon a mortgagee to pay the taxes unless he be in possession of the land; and he is not there-

[1] Adams *v.* Brown, 7 Cush. 220.

[2] Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242.

[3] Waterman *v.* Curtis, 26 Conn. 241.

[4] Boston & Worcester R. R. Co. *v.* Haven, 8 Allen (Mass.), 359.

[5] §§ **77**, **1080**; Robinson *v.* Ryan, 25 N. Y. 320; Burr *v.* Veeder, 3 Wend. (N. Y.) 412; Eagle Fire Ins. Co. *v.* Pell, 2 Edw. (N. Y.) 631; Harper *v.* Ely, 70 Ill. 581; Strong *v.* Blanchard, 4 Allen (Mass.), 538; Kilpatrick *v.* Henson (Ala.), 1 So. Rep. 188, 193.

[6] § **358**; Cook *v.* Kraft, 3 Lans. (N. Y.) 512; Davis *v.* Bean, 114 Mass. 360; Dozier *v.* Mitchell, 65 Ala. 511; Dooley *v.* Potter (Mass.), 15 N. E. Rep. 499; Horrigan *v.* Wellmuth, 77 Mo. 542; Sidenberg *v.* Ely, 90 N. Y. 257; *S. C.* 11 Abb. N. C. 354; Young *v.* Omohundro (Md.), 16 Atl. Rep. 120.

Contra: Savage *v.* Scott, 45 Iowa, 130. But in Barthell *v.* Syverson, 54 Iowa, 160, 164, it is remarked that the language of the court in the preceding case should be strictly confined to the facts of that case.

[7] Dale *v.* M'Evers, 2 Cow. (N. Y.) 118; Rapelye *v.* Prince, 4 Hill (N. Y.), 119.

fore responsible to the mortgagor for the loss of the property through the non-payment of the taxes.[1]

It is held, however, that a mortgagee in possession who suffers the lands to be sold for taxes, will not be allowed the amount paid by him to redeem, but only the amount of the taxes, with interest, for, being in possession, it is his duty to see that the taxes are paid.[2]

When the mortgagee, instead of paying the taxes, purchases the land at a tax sale, it is held in Michigan, that, though the mortgagor may treat such purchase as a payment, the right so to treat it is the right of the mortgagor only. Against the mortgagor's will the mortgagee cannot claim the purchase to be a payment in his behalf.[3]

In Iowa it is held that, inasmuch as the mortgagee has the right to pay the taxes in order to protect his mortgage, his purchase at the tax sale must be regarded merely as such payment, and not as giving him a title.[4]

If the mortgagee of an undivided half interest pay the whole tax levied upon the premises in order to preserve his lien, he can only charge against the mortgagor one half of the amount so paid.[5]

Taxes paid by a mortgagee on a tract of land not covered by the mortgage cannot be added to the amount of the mortgage debt.[6]

1135. Insurance premiums. — Where it is part of the contract of the mortgagor, and a condition of the mortgage, that he shall keep the premises insured in a certain sum for the benefit of the mortgagee, charges for premiums paid by him for such insurance, which the mortgagor has neglected to obtain, or pay for, are allowed,[7] though the insurance obtained be "for whom it may concern" and payable to the mortgagee.[8] But he is not

[1] Harvie *v.* Banks, 1 Rand. (Va.) 408.

[2] Moshier *v.* Norton, 100 Ill. 63.

[3] Maxfield *v.* Willey, 46 Mich. 252; Jones *v.* Wells, 31 Mich. 170. This distinction seems not to have been taken elsewhere, and probably will not be. Broquet *v.* Sterling, 56 Iowa, 357.

[4] Eck *v.* Swennenson (Iowa), 35 N. W. Rep. 503.

[5] Weed *v.* Hornby, 35 Hun (N. Y.), 580.

[6] Crane *v.* Aultman-Taylor Co. 61 Wis. 110.

[7] Harper *v.* Ely, 70 Ill. 581; Carr *v.* Hodge, 130 Mass. 55. Text quoted with approval in Hosford *v.* Johnson, 74 Ind. 479; Johnson *v.* Hosford, 110 Ind. 572; Neale *v.* Albertson, 39 N. J. Eq. 382; American Button-Hole Co. *v.* Burlington Mut. Loan Asso. 68 Iowa, 326; McCormick *v.* Knox, 105 U. S. 122.

[8] Fowley *v.* Palmer, 5 Gray (Mass.), 549.

allowed for premiums paid by him to insure his own interest as mortgagee where the amount recovered in case of loss would go to him for his sole benefit without extinguishing the mortgage debt *pro tanto*.[1] An assignee of a mortgage containing such a provision for insurance has the same right as the mortgagee to claim allowance upon redemption of the mortgage for sums paid for insurance while the mortgagor neglected to insure.[2]

Unless there be a provision in the mortgage for insuring the property for the mortgagee's benefit, he is not generally allowed for premiums paid by him for such insurance.[3] When there is such a requirement, premiums for insurance taken in excess of the amount stipulated for in the mortgage will not be allowed.[4]

Insurance procured by the mortgagee is not chargeable to the mortgagor, unless it is procured at his request, or in accordance with a provision in the mortgage.[5]

1136. The amount of insurance recovered upon a policy upon the buildings standing upon the mortgaged premises, procured by the owner at his own expense but payable to the mortgagee in case of loss in pursuance of a provision of the mortgage, must be applied in reduction of the mortgage debt upon redemption, although the insurance company, upon paying the loss to the mortgagee, take from him an assignment of the mortgage and policy.[6]

1137. A mortgagee in possession who is compelled to pay a prior mortgage, or other lien, in order to protect his title, has, as against the mortgagor and those claiming under him, a right to indemnify himself out of the mortgaged property.[7] And even if such prior mortgage is discharged of record before title accrued to the person seeking to redeem, instead of an assignment of it being made to the mortgagee who paid it, he is to be allowed for the sum so paid, especially if it appears that the whole amount claimed

[1] Fowley *v.* Palmer, 5 Gray (Mass.) 549.

[2] Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242.

[3] Faure *v.* Winans, Hopk. (N. Y.) 283; but in Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48, 81, such an allowance was made under the peculiar circumstances of the case.

[4] Madison Av. Church *v.* Oliver St. Church, 41 Superior Ct. (N. Y.) 369.

[5] Bellamy *v.* Brickenden, 2 John. & H. 137; Dobson *v.* Land, 8 Hare, 216; Boston & Worcester R. R. *v.* Haven, 8 Allen (Mass.), 359; White *v.* Brown, 2 Cush. (Mass.) 412.

[6] Graves *v.* Hampden F. Ins. Co. 10 Allen (Mass.), 281.

[7] Harper *v.* Ely, 70 Ill. 581; Comstock *v.* Michael, 17 Neb. 288; Talbott *v.* Lancaster (Ky.), 9 S. W. Rep. 694; Page *v.* Foster, 7 N. H. 392; Arnold *v.* Foot, 7 B. Mon. (Ky.) 66; McCormick *v.* Knox, 105 U. S. 122.

by the mortgagee is less than what appears to be due upon the mortgage by the record.[1]

A mortgagee who has advanced money to protect the property from injury or loss is held to have a good charge upon the property for the money so advanced.[2] Money paid by the mortgagee to protect the title to the estate from prior incumbrances may be added by him to the principal of his claim, and he is entitled to interest upon the sum so paid.[3]

Where the employment of a watchman is necessary to preserve the property from destruction, the mortgagee in possession is entitled to charge in his account upon redemption the amount so paid.[4]

1138. The mortgagee should be credited for reasonable counsel fees paid in collecting rents and profits; but not for counsel fees in suits between the mortgagee and mortgagor.[5]

A mortgagee who has paid a claim upon which he was surety of the mortgagor, and which the mortgage was given to secure, should be allowed the whole sum paid, although he has afterwards received contribution from a co-security.[6]

VI. *Annual Rests.*

1139. Rule for annual rests in stating account. — Chief Justice Shaw,[7] in directing that an account be reformed by making annual rests, laid down the following rule: —

"1. State the gross rents received by the defendant to the end of the first year. 2. State the sums paid by him for repairs, taxes, and a commission for collecting the rents, and deduct the same from the gross rents, and the balance will show the net rents to the end of the year. 3. Compute the interest on the note for one year, and add it to the principal, and the aggregate will show the amount due thereon at the end of the year. 4. If the net annual rent exceeds the year's interest on the note, deduct that rent from the amount due, and the balance will show the

[1] Davis *v.* Winn, 2 Allen (Mass.), 111.

[2] Rowan *v.* Sharps' Rifle Manuf. Co. 29 Conn. 282; Hughes *v.* Johnson, 38 Ark. 285.

[3] Godfrey *v.* Watson, 3 Atk. 517, 518; Sandon *v.* Hooper, 3 Beav. 248; Pelly *v.* Wathen, 7 Hare, 351, 373; Davis *v.* Bean, 114 Mass. 360.

[4] Johnson *v.* Hosford, 110 Ind. 572.

[5] Hubbard *v.* Shaw, 12 Allen (Mass.), 120; Boston & Worcester R. R. Co. *v.* Haven, 8 Allen (Mass.), 359; Rowell *v.* Jewett, 73 Me. 365.

[6] Strong *v.* Blanchard, 4 Allen (Mass.), 538.

[7] Van Vronker *v.* Eastman, 7 Met. (Mass.) 157.

amount remaining due at the end of the year. 5. At the end of the second year go through the same process, taking the amount due at the beginning of the year as the new capital to compute the year's interest upon. So to the time of judgment."

Statements of substantially the same rule have frequently been made. The two essential points are: First, that when there is a surplus of receipts in any year above the interest then due, a rest shall be made, and the balance remaining after discharging the interest shall be applied to reduce the principal, so that the mortgage shall not continue to draw interest for the face of it, when in fact the mortgagee has in his hands money that should be applied to reduce the principal, and thereby make the interest less for the following year.

Secondly, although the amount received in any year be insufficient to pay the interest accrued, the surplus of interest must not be added to the principal to swell the amount on which interest shall be paid for the following year; for that would result in the charging of interest upon interest, which is not allowed; but the interest continues on the former principal until the receipts exceed the interest due. These are the principles upon which the mortgagee's interest account is everywhere made up; and the cases in which they are stated are many and in general accord.[1]

Except for the first part of the rule, that if the annual rents exceed the interest on the mortgage debt annual rests shall be made and interest allowed on the surplus, great injustice would be done in many cases.[2] If, for instance, the debt were $5,000 and the rents should be in excess of the interest, the amount of $500 each year, and no rests were made, the mortgagee might remain in possession ten years, with the entire mortgage debt drawing interest all the while; when in fact he had received $500 of the principal each year, and during the last year, while only $500 would remain due, he would receive the interest of ten times that sum.

[1] Connecticut *v.* Jackson, 1 Johns. (N. Y.) Ch. 13, 17; Stone *v.* Seymour, 15 Wend. (N. Y.) 19, 24; Jencks *v.* Alexander, 11 Paige (N. Y.), 619, 625; French *v.* Kennedy, 7 Barb. (N. Y.) 452; Bennett *v.* Cook, 5 Thomp. & C. (N. Y.) 134; *S. C.* 2 Hun, 526; Snavely *v.* Pickle, 29 Gratt. (Va.) 27; Moshier *v.* Norton, 100 Ill. 63; Adams *v.* Sayre, 76 Ala. 509, quoting text.

For exceptional cases in which annual rests are not required, see Patch *v.* Wild, 30 Beav. 99; Horlock *v.* Smith, 1 Coll. Ch. 287.

[2] Green *v.* Wescott, 13 Wis. 606; Shaeffer *v.* Chambers, 6 N. J. Eq. (2 Halst.) 548; Gordon *v.* Lewis, 2 Sumn. 143, 147; Shephard *v.* Elliot, 4 Madd. 254; Gibson *v.* Crehore, 5 Pick. 146, 160; Reed *v.* Reed, 10 Pick. 398.

1140. If the rents and profits exceed the sums properly chargeable for repairs and the care of the estate, so that there is a net surplus applicable to the payment of interest on the debt, annual rests in the computation of interest should be made.[1] Semi-annual rests have been allowed where the rents and profits received quarterly were sufficient to pay the interest.[2] But if there be nothing received from the property that is applicable from time to time to the payment of the accrued interest, no rests can be made.[3] Annual rests are directed when the mortgagee is personally in possession as well as when he receives rents from a tenant.[4]

In taking the account between the mortgagee and mortgagor the surplus of his receipts over his disbursements should be applied to the payment of the interest as it becomes due; and if more than sufficient for that purpose, the excess should be credited on the principal.[5] If in any year his disbursements exceeded his receipts, the amount of the deficit should be added to the principal of the debt. Annual rests may be made, so that the mortgagor may be charged with interest for disbursements made by the mortgagee, but not so as to charge the debtor with compound interest either upon the mortgage or upon the advances.[6] According to the English decisions, if there is interest in arrear at the time the mortgagee takes possession, annual rests are not generally required until the interest in arrear is paid off,[7] or even until the whole mortgage debt has been paid off.[8] But the better rule is, that any surplus of receipts in any year, above all the interest then due and disbursements, should be applied in reduction of the principal, irrespective of the fact that there was interest in arrear at the time the mortgagee took possession.[9]

1141. As to the rate of interest, the contract of the parties will govern after default as well as before. If the rate reserved

[1] Gladding *v.* Warner, 36 Vt. 54; Reed *v.* Reed, 10 Pick. 398; Green *v.* Wescott, 13 Wis. 606; Blum *v.* Mitchell, 59 Ala. 535.

[2] Gibson *v.* Crehore, 5 Pick. (Mass.) 146, 160.

[3] Reed *v.* Reed, *supra;* Montague *v.* Boston & Albany R. R. Co. 124 Mass. 242.

[4] Wilson *v.* Metcalfe, 1 Russ. 530; Morris *v.* Islip, 20 Beav. 654.

[5] Shephard *v.* Elliot, 4 Madd. 254; Gould *v.* Tancred, 2 Atk. 533; Mahone *v.* Williams, 39 Ala. 202; Elmer *v.* Loper, 25 N. J. Eq. 475; Johnson *v.* Miller, 1 Wils. (Ind.) 416.

[6] Vanderhaise *v.* Hugues, 13 N. J. Eq. 410; Moshier *v.* Norton, 100 Ill. 63.

[7] Wilson *v.* Cluer, 3 Beav. 136, 140.

[8] Latter *v.* Dashwood, 6 Sim. 462; Finch *v.* Brown, 3 Beav. 70; see, also, Morris *v.* Islip, 20 Beav. 659; Thorneycroft *v.* Crockett, 2 H. L. C. 233; Horlock *v.* Smith, 1 Coll. Ch. 287.

[9] Moshier *v.* Norton, 100 Ill. 63, 73.

in the mortgage be less than the legal rate, it will continue at that rate until paid.[1] If, on the other hand, that rate be in excess of the rate allowed upon judgments and upon contracts when the parties have not fixed upon a different rate, it will continue at the same rate after default until the debt be paid or merged in a judgment. The rule upon this point, however, is not uniform in the different states; but the rule above stated has the support of the weight of authority, and best accords with the intention of the parties and with the principles of equity that govern the enforcement and redemption of mortgages.[2] But even where the rule is that after maturity the legal rate of interest governs instead of the contract rate, it is conceded that if the parties have by their contract shown with sufficient clearness their intention that the stipulated rate is to continue after maturity, then that rate will govern up to the time of judgment.[3] Of course, if in

[1] § 74; Miller *v.* Burroughs, 4 Johns. (N. Y.) Ch. 436.

[2] Union Institution for Savings *v.* Boston, 129 Mass. 82, 95, per Gray, C. J., who in an able and elaborate opinion reviews the whole subject. See § 74.

[3] Brewster *v.* Wakefield, 22 How. 118; Holden *v.* Trust Co. 100 U. S. 72; Pearce *v.* Hennessy, 10 R. I. 223, 227; Capen *v.* Crowell, 66 Me. 282; Paine *v.* Caswell, 68 Me. 80; Gray *v.* Briscoe, 6 Bush (Ky.), 687; Young *v.* Thompson, 2 Kans. 83.

That the stipulated rate of interest continues after default is the rule in: —

England: Price *v.* Great Eastern Ry. Co. 15 M. & W. 244; Morgan *v.* Jones, 8 Exch. 620; Keene *v.* Keene, 3 C. B. (N. S.) 144; Gordillo *v.* Weguelin, 5 Ch. D. 287, 303. See, however, Cook *v.* Fowler, L. R. 7 H. L. 27, where one reason for not allowing the stipulated rate of interest, which is five per cent. per month, was that it was so excessive; and *In re* Roberts, 14 Ch. D. 49, which was decided without referring to the previous decisions, upon the assumption that there was no precedent for giving more than the ordinary or legal rate of interest by way of damages.

Arkansas: Newton *v.* Kennerly, 31 Ark. 626.

California: Corcoran *v.* Doll, 32 Cal. 82; Guy *v.* Franklin, 5 Cal. 416; Kohler *v.* Smith, 2 Cal. 597.

Connecticut: Adams *v.* Way, 33 Conn. 419; Beckwith *v.* Hartford, Prov. & Fishkill R. R. 29 Conn. 268; Hubbard *v.* Callahan, 42 Conn. 524, 537; Seymour *v.* Continental Ins. Co. 44 Conn. 300; Suffield Eccl. Soc. *v.* Loomis, 42 Conn. 570, 575.

Illinois: Etnyre *v.* McDaniel, 28 Ill. 201; Heartt *v.* Rhodes, 66 Ill. 351; Phinney *v.* Baldwin, 16 Ill. 108.

Indiana: Kilgore *v.* Powers, 5 Blackf. 22; Richards *v.* McPherson, 74 Ind. 158; Burns *v.* Anderson, 68 Ind. 202, overruling Kilgore *v.* Powers, *supra.*

Iowa: Hand *v.* Armstrong, 18 Iowa, 324; Thompson *v.* Pickel, 20 Iowa, 490.

Kansas: Robinson *v.* Kinney, 2 Kans. 184; Searle *v.* Adams, 3 Kans. 515.

Kentucky: Rilling *v.* Thompson, 12 Bush, 310.

Maine: Duran *v.* Ayer, 67 Me. 145; Eaton *v.* Boissonnault, 67 Me. 540.

Maryland: Virginia *v.* Chesapeake & Ohio Canal Co. 32 Md. 501.

Massachusetts: Union Inst. for Savings *v.* Boston, *supra;* Brannon *v.* Hursell, 112 Mass. 63; Burgess *v.* Southridge Sav. Bank, 2 Fed. Rep. 500.

Michigan: Warner *v.* Juif, 38 Mich. 662.

either case the debt be merged in a judgment, the rate established by law for all cases when interest is implied will thereafter govern.[1]

Where coupons have been given for the interest on the mortgage debt, they draw interest after maturity in the same manner as do notes for the principal. They provide for the payment of definite sums of money at definite times, and are in effect promissory notes.[2]

Upon the redemption of a mortgage the mortgagor is not obliged to pay compound interest, though the mortgage note may in terms require it.[3] If the mortgage be assigned after the taking of possession, no rest in the computation of interest at that time, by adding the interest then due to the principal, should be made.[4]

1142. The account binds subsequent incumbrancers, though not privy to the taking of it, unless there be fraud or collusion. This is the case even with accounts settled between the mortgagor and mortgagee out of court.[5]

Minnesota: Lash *v.* Lambert, 15 Minn. 416.

Nevada: McLane *v.* Abrams, 2 Nev. 199.

New Jersey: Wilson *v.* Marsh, 13 N. J. Eq. 289.

New York: Miller *v.* Burroughs, 4 Johns. Ch. 436; Van Beuren *v.* Van Gaasbeck, 4 Cow. 496. The later cases, however, seem to leave the question an open one. Bell *v.* Mayor of N. Y. 10 Paige, 49; Hamilton *v.* Van Rensselaer, 43 N. Y. 244; Ritter *v.* Phillips, 53 N. Y. 586.

Ohio: Marietta Iron Works *v.* Lottimer, 25 Ohio St. 621; Monnett *v.* Sturges, 25 Ohio St. 384.

Pennsylvania: Ludwick *v.* Huntzinger, 5 W. & S. 51.

Rhode Island: Pearce *v.* Hennessy, 10 R. I. 223.

South Carolina: Langston *v.* S. C. R. R. 2 S. C. 248.

Tennessee: Overton *v.* Bolton, 9 Heisk. 762.

Texas: Hopkins *v.* Crittenden, 10 Tex. 189.

Virginia: Cecil *v.* Hicks, 29 Gratt. 1.

Wisconsin: Pruyn *v.* Milwaukee, 18 Wis. 367.

On the other hand, the rule, that after maturity interest by way of damages will be allowed only at the ordinary legal rate, prevails in the United States Supreme Court. Brewster *v.* Wakefield, 22 How. 118; Burnhisel *v.* Firman, 22 Wall. 170; Holden *v.* Trust Co. 100 U. S. 72. But the local law to the contrary in any state will be followed in a case coming to the court from that state. Cromwell *v.* County of Sac. 96 U. S. 514; Burgess *v.* Southbridge Sav. Bank, 2 Fed. Rep. 500. See Jones on R. R. Securities, § 336, for remarks about this and other cases upon this point.

[1] Taylor *v.* Wing, 84 N. Y. 471.

[2] Gelpcke *v.* Dubuque, 1 Wall. 175, 206; Hollingsworth *v.* Detroit, 3 McLean, 472; Harper *v.* Ely, 70 Ill. 581; Dunlap *v.* Wiseman, 2 Disney (Ohio), 398. See Jones on R. R. Securities, §§ 332–336.

[3] Parkhurst *v.* Cummings, 56 Me. 155; Stone *v.* Locke, 46 Me. 445.

[4] Boston Iron Co. *v.* King, 2 Cush. (Mass.) 400.

[5] Wrixon *v.* Vize, 2 Dru. & War. 192; Knight *v.* Bampfeild, 1 Vern. 179.

1143. An account may be opened for fraud or a particular error even after a long lapse of time.[1] The fraud or error must be particularly alleged; a general charge being sufficiently answered by a general denial.[2]

[1] Vernon *v.* Vawdry, 2 Atk. 119.

[2] Drew *v.* Power, 1 Sch. & Lef. 182, 192; Kinsman *v.* Barker, 14 Ves. 579.

CHAPTER XXIV.

WHEN THE RIGHT TO REDEEM IS BARRED.

I. The statute of limitations applies by analogy, 1144–1151.
II. When the statute begins to run, 1152–1161.
III. What prevents the running of the statute, 1162–1173.

I. *The Statute of Limitations applies by Analogy.*

1144. In general, except when changed by modern statutes, the rule adopted by courts of equity in regard to the redemption of mortgages is in analogy with the right of entry at law, under the old statute of limitations, 21 Jac. 1, ch. 16, that twenty years' possession by the mortgagee without any account or acknowledgment of a subsisting mortgage is a bar, unless the mortgagor is within some of the exceptions made for disabilities.[1] "Otherwise," said Lord Hardwicke, "it would make property very precarious, and a mortgagee would be no more than a bailiff to the mortgagor, and subject to an account, which would be a great hardship."[2] In analogy to the same statute the same exceptions

[1] **England**: Barron *v.* Martin, 19 Ves. 327, and cases cited; Blake *v.* Foster, 2 Ball & B. 387, 402; Johnson *v.* Mounsey, 40 L. T. N. S. 234; *S. C.* 7 Reporter, 701. **United States**: Amory *v.* Lawrence, 3 Cliff. 523; Slicer *v.* Bank of Pittsburg, 16 How. 571; Hughes *v.* Edwards, 9 Wheat. 489; Dexter *v.* Arnold, 1 Sumn. 109. **Massachusetts**: Ayres *v.* Waite, 10 Cush. 72; Howland *v.* Shurtleff, 2 Met. 26. **New York**: Demarest *v.* Wynkoop, 3 Johns. Ch. 129, where Chancellor Kent cites many cases; Moore *v.* Cable, 1 Ib. 385; Slee *v.* Manhattan Co. 1 Paige, 48. **Maine**: Phillips *v.* Sinclair, 20 Me. 269; Randall *v.* Bradley, 65 Me. 43; Blethen *v.* Dwinal, 35 Me. 556; Roberts *v.* Littlefield, 48 Me. 61. **Alabama**: Gunn *v.* Brantley, 21 Ala. 633; Coyle *v.* Wilkins, 57 Ala. 100; Byrd *v.* McDaniel, 33 Ala. 18; Goodwyn *v.* Baldwin, 59 Ala. 127. **Illinois**: Hallesy *v.* Jackson, 66 Ill. 139; Locke *v.* Caldwell, 91 Ill. 417. **Wisconsin**: Rogan *v.* Walker, 1 Wis. 527; Knowlton *v.* Walker, 13 Wis. 264. **Other States**: McNair *v.* Lot, 34 Mo. 285; Ross *v.* Norvell, 1 Wash. (Va.) 14, 17; Bates *v.* Conrow, 11 N. J. Eq. (3 Stockt.) 137; Cook *v.* Finkler, 9 Mich. 131; Montgomery *v.* Chadwick, 7 Iowa, 114; Bailey *v.* Carter, 7 Ired. (N. C.) Eq. 282; Hoffman *v.* Harrington, 33 Mich. 392; Hall *v.* Denckla, 28 Ark. 506; Crawford *v.* Taylor, 42 Iowa, 260; Clark *v.* Potter, 32 Ohio St. 49.

[2] Anon. 3 Atk. 313.

are made for disabilities, and ten years allowed after their removal within which the right may be asserted, at the expiration of which time the bar is complete.[1]

The right of the mortgagor to redeem being an equitable and not a legal right, the statute of limitations does not strictly constitute a bar to a bill to redeem; but equity adopts the statutory period of twenty years after forfeiture and possession taken by the mortgagee, beyond which the mortgagor shall not be allowed to redeem if he has paid no interest in the mean time. Such lapse of time affords evidence of a presumption that the mortgagor has abandoned his right.[2] But no lapse of time less than twenty years is a sufficient answer to the mortgagor's bill to redeem where that is the time necessary to bar real actions;[3] and that is not a conclusive and absolute bar, but only affords a presumption of fact, which may be controlled by evidence.[4]

After the mortgagee has remained in possession for twenty years without accounting, or in any way acknowledging the right of redemption in the mortgagor, the latter cannot redeem.[5] The possession of the mortgagee must be unequivocally adverse to the mortgagor or person entitled to the equity of redemption. The fact that he entered with the consent of the owner makes his possession none the less adverse, unless in return he assumed some obligation to the owner.

If the mortgagor was under disability, the time of his disability is to be deducted, though he cannot avail himself of successive disabilities.[6] In analogy with the statute of limitations of Jac. 1, and generally adopted in this country, ten years is allowed after the removal of the disability within which to bring the action.[7]

1145. The time conforms to the statute in force. In those states, however, in which the time of limitation within which a recovery of land may be had has been changed by statute to a period longer or shorter than twenty years, following the anal-

[1] Beckford *v.* Wade, 17 Ves. 87, 99; Jenner *v.* Tracy, 3 P. Wms. 287, n.; Belch *v.* Harvey, Ib. 287, n.; White *v.* Ewer, 2 Vent. 340; Price *v.* Copner, 1 S. & S. 347.

[2] Robinson *v.* Fife, 3 Ohio St. 551.

[3] Amory *v.* Lawrence, 3 Cliff. 523. For a brief statement of the limitation of real actions in the several states, see chapter XXVI. § 1193.

[4] Ayres *v.* Waite, 10 Cush. (Mass.) 72.

[5] Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129; Jackson *v.* Voorhis, 9 Johns. (N. Y.) 129; Stevens *v.* Dedham Institution for Savings, 129 Mass. 547.

[6] Demarest *v.* Wynkoop, *supra.*

[7] And see Lamar *v.* Jones, 3 Har. & M. (Md.) 328,

ogy of those statutes the time within which the mortgagor may redeem from the mortgagee in possession will be the same; as, for instance, the statute of limitations in Connecticut prescribing fifteen years as the period beyond which an entry shall not be made, a mortgagor is there barred by the lapse of this period during which the mortgage title has not been recognized by the mortgagee in possession.[1] In a few states special statutes have been enacted with reference to the redemption of mortgages, and a synopsis of these statutes, and of the English statute upon which they are founded as well, is given in a note.[2]

[1] Jarvis *v.* Woodruff, 22 Conn. 548; Skinner *v.* Smith, 1 Day (Conn.), 124; Crittenden *v.* Brainard, 2 Root (Conn.), 485; Fox *v.* Blossom, 17 Blatchf. 352; Byrd *v.* McDaniel, 33 Ala. 18; Coyle *v.* Wilkins, 57 Ala. 108; Dawson *v.* Hoyle, 58 Ala. 44; Askew *v.* Sanders (Ala.), 4 So. Rep. 167.

[2] **California**: An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage. If there is more than one such mortgagor or person claiming under him, and one is entitled to maintain the action and others are not so entitled, the person entitled may redeem a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises. Civil Code of Procedure 1872, §§ 346, 347. Under this statute an action to redeem, where the mortgagee is in possession, may be brought at any time, provided there shall not have been an adverse possession for five years. Raynor *v.* Drew, 13 Pac. Rep. 866; Warder *v.* Enslen, 14 Pac. Rep. 874; Cohen *v.* Mitchell, 9 Pac. Rep. 649. **Kentucky**: After a mortgagee of real property, or any person claiming under him, has had fifteen years' continued adverse possession, no action shall be brought by the mortgagor, or any one claiming under him, to redeem it. G. S. 1873, ch. 71, art. iv. § 16. **Mississippi**: When a mortgagee, after a forfeiture of the mortgage, has obtained actual possession, or receipt of the profits or rent of the land mortgaged, the mortgagor, or any person claiming through him, shall not bring suit to redeem but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the mean time an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given in writing, signed by the mortgagee, or the person claiming through him; and in such case no suit shall be brought but within ten years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given; but such acknowledgment shall be effectual only as against, and to the extent of the interest of, the party signing it. R. C. 1871, § 2149; R. C. 1880, § 2666. **New Jersey**: If a mortgagee and those under him be in possession of the lands contained in the mortgage, or any part thereof, for twenty years after default of payment by the mortgagor, then the right or equity of redemption is forever barred. Rev. 1877, p. 507. **North Carolina**: An action for the redemption of a mortgage where the mortgagee has been in possession, or for a residuary

1146. The right to foreclose and the right to redeem are reciprocal. Since the rights of the mortgagor and mortgagee are reciprocal and commensurable, redemption under the mortgage is cut off at the expiration of the same time that the right to foreclose is barred.[1] In accordance with this maxim, it is held in

interest under a deed of trust for creditors where the trustee, or those holding under him, has been in possession, must be brought within ten years after the right of action accrued. Battle's Revisal 1873, p. 149. A presumption of abandonment of this right arises within ten years after forfeiture. Houck *v.* Adams, 4 S. E. Rep. 502. **Washington T.**: Under § 33 of the Code 1881, the action must be brought within two years. Parker *v.* Dacres, 2 Wash. T. 439. For the statute in **New York**, see **§ 1147**; R. Code, ch. 65, § 19.

The English Statute of 3 & 4 Will. 4, ch. 27, § 28. — When a mortgagee shall have obtained possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within *twenty* years next after the time at which the mortgagee obtained such possession or receipt, unless, in the mean time, an acknowledgment in writing of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the person or persons signing as aforesaid, and those claiming any part of the mortgage money, or land, or rent, by, from, or under him or them, and persons entitled to any estate or interest to take effect after or in defeasance of his or their estate or interest; and shall not operate to give the mortgagor or mortgagors a right to redeem, as against the persons entitled to any other undivided or divided part of the money, land, or rent. And where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some interest or estate therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment with interest of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

The Real Property Limitation Act 1874, § 7, which went into operation on and after January 1, 1879, is the same as the foregoing, except the time is made *twelve* years instead of *twenty*.

[1] King *v.* Meighen, 20 Minn. 264; Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202; Koch *v.* Briggs, 14 Cal. 256; Grattan *v.* Wiggins, 23 Cal. 16, 34; Cunningham *v.* Hawkins, 24 Cal. 403, 410; Arrington *v.* Liscom, 34 Cal. 365, 372; Lord *v.* Morris, 18 Cal. 482; Green *v.* Turner, 38 Iowa, 112, 116; Haskell *v.* Bailey, 22 Conn. 569; Locke *v.* Caldwell, 91 Ill. 417. Otherwise in **Alabama**: **§ 1192.**

California that in case the debt is foreclosed in four years the right to redeem is barred by the lapse of the same period.[1] In Iowa, also, an action to redeem is barred in ten years, the same time in which an action at law for the debt secured would be barred.[2] The same application of the principle is made in Minnesota, where, in analogy to a statute specially providing that an action to foreclose shall be commenced within ten years after the cause of action accrues, redemption must be made within the same time.[3] Of course this principle cannot be applied where by statute, or by operation of judicial construction of the statute, a different time is fixed for redemption from that allowed for foreclosure, as in Wisconsin.

1147. The right of redemption in New York was formerly barred in ten years. It was held that inasmuch as the statute of limitations, so far as it limits the recovery of the possession of real property to twenty years, did not apply to cases of which a court of equity had peculiar and exclusive jurisdiction, an action by a mortgagor for redemption or for an accounting and recovery of possession against a mortgagee in possession came within the provision of the statute limiting the time for the commencement of actions not otherwise specified, and was thereby limited to ten years from the time the right of action accrues.[4] To a similar statute in Wisconsin the same construction is given.[5]

But in the new Code of New York, it is expressly provided that the right of redemption may be maintained by the mortgagor or those claiming under him against the mortgagee in possession or those claiming under him, unless he or they have continuously maintained adverse possession for twenty years after breach of the condition.[6]

1148. In Tennessee it is held that the statute of limitations

[1] Cunningham *v.* Hawkins, 24 Cal. 403, 410.

[2] Smith *v.* Foster, 44 Iowa, 442; Crawford *v.* Taylor, 42 Iowa, 260; Gower *v.* Winchester, 33 Iowa, 303.

[3] Holton *v.* Meighen, 15 Minn. 69, 80; King *v.* Meighen, 20 Minn. 264; Parsons *v.* Noggle, 23 Minn. 328; Fisk *v.* Stewart, 26 Minn. 365; Rogers *v.* Benton, 38 N. W. Rep. 765.

[4] 4 Kent Com. p. 188; Hubbell *v.* Sibley, 50 N. Y. 468, affirming 5 Lans. 51; Miner *v.* Beekman, 50 N. Y. 337; *S. C.* 14 Abb. Pr. N. S. 1; Tibbs *v.* Morris, 44 Barb. 138, 146; Peabody *v.* Roberts, 47 Barb. 91, 102; Cleveland *v.* Boerum, 24 N. Y. 613, 617.

[5] Cleveland Ins. Co. *v.* Reed, 24 How. 284; *S. C.* 1 Biss. 180; Knowlton *v.* Walker, 13 Wis. 264.

[6] Code of Civ. Procedure 1876, § 379. The construction of the former statute, though conclusively established by the decisions, was regarded as being contrary to the intent of the legislature, and to the general policy of the law.

does not apply to a bill in equity to redeem a mortgage, because redemption can only be enforced in equity, and the statute does not apply to cases belonging to the exclusive jurisdiction of courts of equity. "But although equity does not permit the statute of limitations to be pleaded to the relief which it affords to the right of redemption, yet, in the application of that relief, it regards time and discountenances stale demands."[1] The court would doubtless adopt the period of twenty years as affording a presumption of right in the mortgagee, after analogy of the statute of limitations.[2] The possession of the mortgagee is consistent with the right of the mortgagor, unless it be continued long enough to afford such a presumption, which a shorter period than twenty years would not give. But if the mortgagee purchase an outstanding title, and hold it adversely to the mortgagor with his knowledge, the statute which makes seven years' adverse possession a bar to an action to recover will run in the mortgagee's favor, and will perfect the title in him.[3]

1149. The mortgagee's possession must be adverse during the whole period, and therefore if, at the time of his entry, he is entitled to an interest in the equity of redemption, or if he subsequently acquires such an interest, as, for instance, a tenancy for life, he loses the benefit of the statute.[4] Time will not run in his favor so long as his interest in the equity of redemption continues.

1150. The mortgagee's possession, when adverse, operates equally against a married woman who has made the mortgage. She is in no way protected by her coverture from the effect of the adverse possession of the mortgagee. The adverse possession is against the equitable right of the mortgagor to redeem, and the limitation is an equitable one in analogy to the statute of limitations at law; and it is regarded as equitable that a wife should lose her right in equity to redeem when there has been such a lapse of time as would in equity bar any other mortgagor. The

[1] Overton *v.* Bigelow, 3 Yerg. (Tenn.) 513.

[2] In Yarbrough *v.* Newell, 10 Yerg. 376, the court, in affirming the doctrine laid down in Overton *v.* Bigelow, say: "In those states of the Union where the time fixed by the statute of limitations is twenty years, the courts of equity have taken the same time 'as the presumption of right' in a mortgagee. But we know of no case, either in this state or any of the other states where the statute of limitations is for a shorter period, that the courts of equity have reduced the time within which a mortgage may be redeemed to that period."

[3] Gudger *v.* Barnes, 4 Heisk. (Tenn.) 570; Wallen *v.* Huff, 5 Humph. (Tenn.) 91, 94.

[4] Hyde *v.* Dallaway, 2 Hare, 528; Raffety *v.* King, 1 Keen, 601.

privileges and exemptions of married women should be curtailed as their separate rights in regard to their property are recognized. Having voluntarily placed herself in the position of a mortgagor, she must accept the usual incidents of the position, and her equitable right to redeem is lost when there has been such a lapse of time as would bar the right of any other mortgagor.[1]

1151. Successive disabilities of mortgagor. — To entitle the mortgagor to the benefit of a disability, it must be one that existed at the time the right to redeem first accrued; and though if several disabilities existed together, the statute does not begin to run until the party entitled to redeem has survived all of them, yet successive or cumulative disabilities are not allowed. "If disability could be added to disability," says Chancellor Kent, "claims might be protracted to an indefinite extent;"[2] and he quotes an expression of Lord Eldon, that "a right might travel through minorities for two centuries."

II. *When the Statute begins to run.*

1152. So long as the relation of mortgagor and mortgagee exists the statute does not commence to run in favor of either the mortgagor or the mortgagee.[3] That relation must be terminated in some way before either party in possession can interpose the statute as a defence against the other. As against the mortgagor this relation is generally terminated when the mortgagee, after a breach of the condition, enters and holds possession of the mortgaged property.[4] Such possession, whether it be for the purpose of receiving the rents and profits, or for the purpose of foreclosure,[5] or for the purpose of wresting the property from the mortgagor, is equally effectual. When, however, by the terms of the mortgage, or by subsequent agreement, the mortgagee is to

[1] Hanford *v.* Fitch, 41 Conn. 486.

[2] Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129, 139, and numerous cases cited.

The disabilities of the mortgagee which may give him an extension of time are limited by the English statute to the extreme period of forty years in all, under Stat. 3 & 4 Wm. 4, ch. 27, §§ 16, 17, and to thirty years under Stat. 37 & 38 Vict. ch. 57. Much doubt had been entertained as to the effect of successive disabilities under the former statute until the case of Borrows *v.* Ellison, L. R. 6 Ex. 128, where it was decided that when the causes of disability overlap, the disability continues subject to the extreme limitation provided.

[3] Waldo *v.* Rice, 14 Wis. 286; Green *v.* Turner, 38 Iowa, 112, 118; Crawford *v.* Taylor, 42 Iowa, 260; and see Humphrey *v.* Hurd, 29 Mich. 44; Rockwell *v.* Servant, 54 Ill. 251; Babcock *v.* Wyman, 19 How. 289, affirming *S. C.* Wyman *v.* Babcock, 2 Curtis, 386.

[4] Stevens *v.* Dedham Institution for Savings, 129 Mass. 547.

[5] Montgomery *v.* Chadwick, 7 Iowa, 114; Bailey *v.* Carter, 7 Ired. (N. C.) Eq. 282.

take and hold possession of the property until he shall satisfy his claim from the rents and profits, his possession does not become adverse until his demand has been satisfied from this source, or he asserts an absolute title in himself, and gives distinct notice of it to the mortgagor.[1] The right of redemption is not lost by lapse of time when the mortgagor remains in possession for himself and not for the mortgagee.[2]

1153. As to a Welsh mortgage. — A mortgage containing such an agreement is in the nature of a Welsh mortgage, and from the very nature of the agreement it is constantly renewed by the receipt of the rents and profits in payment of interest or in discharge of the debt. The mortgagee's possession is of the essence of the contract; he holds the estate subject to perpetual account.[3] Time will not bar the mortgagor, unless the mortgagee disclaims the mortgage and gives him notice in effect that he holds in defiance of his title; or a sufficient length of time to constitute a bar has elapsed since the principal and interest of the mortgage has been paid from the rents and profits.[4] The mortgagor could in equity, doubtless, compel an account, which would show when the mortgage was paid.[5]

1154. The mortgagee's possession runs against those entitled to the estate in remainder as well as against the tenant for life, and if his possession has continued for twenty years before the title of the remainder-man accrued, the bar is as effectual against him as it was against the life-tenant, who had the immediate right to redeem during the whole period of his possession.[6] The rule is the same in case the tenancy during the possession was by the curtesy,[7] or by right of dower.[8]

1155. If the mortgagor retains possession of a part of the mortgaged premises, though the mortgagee be in possession of the

[1] Anding *v.* Davis, 38 Miss. 574; Kohlheim *v.* Harrison, 34 Miss. 457; Frink *v.* Le Roy, 49 Cal. 314; and see Quint *v.* Little, 4 Me. 495; Warder *v.* Enslen (Cal.), 14 Pac. Rep. 874.

[2] Bird *v.* Keller, 77 Me. 270.

[3] Fenwick *v.* Reed, 1 Mer. 114; Orde *v.* Heming, 1 Vern. 418; Balfe *v.* Lord, 2 Dr. & War. 480; Morgan *v.* Morgan, 10 Ga. 297; Marks *v.* Pell, 1 Johns. (N. Y.) Ch. 594. So under an arrangement for repayment by annuities. Tenlon *v.* Curtis, 1 Younge, 610.

[4] Yates *v.* Hambly, 2 Atk. 360; Longuet *v.* Scawen, 1 Ves. Sen. 402; Alderson *v.* White, 2 De G. & J. 97; Talbot *v.* Braddill, 1 Vern. 394; Lawley *v.* Hooper, 3 Atk. 278, 280; Fenwick *v.* Reed, *supra.*

[5] Fulthorpe *v.* Foster, 1 Vern. 477.

[6] Harrison *v.* Hollins, 1 S. & S. 471; Ashton *v.* Milne, 6 Sim. 369; Dallas *v.* Floyd, Ib. 379.

[7] Anon. 2 Atk. 333.

[8] Lockwood *v.* Lockwood, 1 Day (Conn.), 295.

remainder, no lapse of time will bar the right of redemption of the entire estate.[1] The right existing as to any part, it must exist as to the whole, for as a general rule there can be no redemption of separate parts. If the mortgagor has constructive possession, as when the mortgagee has entered under a lease, or an agreement amounting equitably to a lease, the statute will not begin to run against the right of redemption until the mortgagee ceases to hold under such lease.[2]

It may happen, however, that a part of an estate may become irredeemable while the right of redemption is not lost as to the residue.[3]

1156. The cause of action accrues when the mortgagee enters into possession, not when the money secured by the mortgage becomes due.[4] Until then the plaintiff has no occasion for this remedy to regain possession. The possession may be explained, so that it is not so much the possession itself as the nature of it that operates as a bar to the right to redeem; but the presumption is that the possession is adverse after an entry upon a default in the mortgage. When the mortgagee has entered, not as mortgagee only, but by virtue of having a limited interest in the equity of redemption, as, for instance, a life estate, it is held that time will not run in his favor during the continuance of that interest, for it would be his duty to keep down the interest on his mortgage in favor of the remainder-men.[5]

As against the owner of the equity of redemption, the statute does not begin to run until the mortgagee takes actual and open possession of the mortgaged premises; and it does not begin then if he holds merely under his mortgage title and recognizes the mortgagor's right of redemption.[6]

[1] Burke *v.* Lynch, 2 Ball & B. 426; Rakestraw *v.* Brewer, Sel. Cas. in Ch. 56.

[2] Arehbold *v.* Scully, 9 H. L. 360; Drummond *v.* Sant, L. R. 6 Q. B. 763.

[3] Lake *v.* Thomas, 3 Ves. Jun. 17.

[4] Hubbell *v.* Sibley, 50 N. Y. 468; Peabody *v.* Roberts, 47 Barb. (N. Y.) 91; Miner *v.* Beckman, 50 N. Y. 337; *S. C.* 14 Abb. Pr. N. S. 1; Knowlton *v.* Walker, 13 Wis. 264; Waldo *v.* Rice, 14 Wis. 286.

In Miner *v.* Beekman, *supra*, it was suggested that perhaps the cause of action does not accrue so long as the mortgagee continues in possession avowedly as mortgagee, without claiming in fee or by any other title; but as in that case the mortgagee claimed by a foreclosure title, there was no occasion for deciding this point.

[5] Story's Eq. Jur. § 1028; Reeve *v.* Hicks, 2 S. & S. 403; Raffety *v.* King, 1 Keen, 601, 618; Seagram *v.* Knight, L. R. 2 Ch. App. 628, 632, per Chelmsford, L. C.

[6] Knowlton *v.* Walker, 13 Wis. 264; Waldo *v.* Rice, 14 Wis. 286.

1157. After twenty years' possession by the mortgagee it lies with the mortgagor to show that the effect is not a bar of his right of redemption. The *onus* lies on the mortgagor to show that fact, in order to defeat the effect of the possession.[1] The presumption is that the right of redemption is gone after the mortgagee's possession has continued for this period of time. But any act done or acknowledgment made by him in the mean time, evincing his recognition of the mortgage as such, may be offered to repel this presumption. Although possession by the mortgagee has continued long enough to give him presumptive title, the nature of his possession is what really determines the rights of the parties, and a great variety of facts and circumstances may be adduced to show it is by virtue of the mortgage only, and consequently does not bar the right to redeem.[2]

A bill to redeem which shows that the mortgagee has been in possession for twenty years or more must distinctly aver the grounds upon which the possession does not constitute a bar. Twenty years' possession under a *de facto* foreclosure is a bar to redemption, though the proceedings were irregular, unless the mortgagor shows circumstances which repel the presumption of title in the mortgagee.[3] A bill brought thirty-four years after the maturity of the mortgage, which averred that the mortgagee's possession was not continuous and adverse for the period of twenty years, but did not aver that the possession was taken within that period, and gave no excuse for the delay in bringing the bill, was dismissed, because the averments were too uncertain to found a right to redeem upon.[4]

1158. Mere constructive possession by the mortgagee for twenty years will not raise a presumption that the title has become absolute in him; and the fact that the mortgaged premises were wild, uncleared lands will not avail a mortgagee as against the mortgagor, although the former has the legal title, and the courts have adopted a rule as to such lands that the possession follows the right; for the purpose of the rule is to protect the owner of such lands from intrusion and trespass.[5] Nothing short of actual possession by the mortgagee, continued for the time

[1] Per Sir Wm. Grant in Barron *v.* Martin, 19 Ves. 326.

[2] Robinson *v.* Fife, 3 Ohio St. 551.

[3] Slicer *v.* Bank of Pittsburg, 16 How. 571; Brobst *v.* Brock, 10 Wall. 519.

[4] Reynolds *v.* Green, 10 Mich. 355.

[5] Moore *v.* Cable, 1 Johns. (N. Y.) Ch. 385, 387; Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48; Locke *v.* Caldwell, 91 Ill. 417.

required by statute, without accounting or admitting that he is merely a mortgagee, but under a claim of absolute ownership, will avail to convert his mortgage title into a title absolute in equity.[1] Payment of taxes on wild land will not avail.[2] An occasional occupation of the premises will not avail. The occupation must be a continuous and notorious one, adverse to the right to redeem.[3]

But where the premises consist of a farm, part of which is improved and has a house upon it, and the possession of the whole is so far adverse as to cause the time to commence running against the right to redeem, a temporary interruption of the actual residence of the mortgagee upon the land, caused by the destruction of the house, will not prevent the statute from continuing to run, if the mortgagee continues to exercise all such acts of ownership and dominion as the nature of the land and its condition admits of.[4]

Where after the death of the mortgagor his widow paid the mortgage debt and inventoried the land as that of her husband, and occupied the premises as a homestead, the widow's possession was held not to be adverse as against the heir, and laches in redeeming was not imputable.[5]

A conveyance by the mortgagee purporting to give an absolute title to the mortgaged property does not work a disseisin of the mortgagor, but passes only the mortgage title.[6] Nor does an absolute conveyance of a portion of the mortgaged premises by the mortgagor while the mortgagee is in possession disseise him or interrupt his possession.[7] But if for twenty years the mortgagor

[1] Miner *v.* Beekman, 50 N. Y. 337; Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129.

[2] Bollinger *v.* Chouteau, 20 Mo. 89; Locke *v.* Caldwell, 91 Ill. 417.

[3] Humphrey *v.* Hurd, 29 Mich. 44.

[4] Clark *v.* Potter, 32 Ohio St. 49.

[5] Hunter *v.* Dennis, 112 Ill. 568.

[6] Humphrey *v.* Hurd, 29 Mich. 44; Dexter *v.* Arnold, 2 Sumn. 108; Daniels *v.* Mowry, 1 R. I. 151.

[7] "Possession in the mortgagee must at its commencement have been taken under the engagement which equity always implies, to account as a bailiff for the rents and profits with the mortgagor, and to apply them to the discharge of the mortgage debt. If this be not punctually and regularly done, and the account fairly and properly kept by the mortgagee, it is a violation of the implied engagement under which he holds the possession. The possession is all along consistent with the equitable title of the mortgagor, who may be disabled by poverty and distress to enforce the account and redemption. Yet such is the prevalence of analogy in equity, that, even under such circumstances, the possession of the mortgagee for twenty years, without a recognition of the mortgage title, or any account kept upon the footing of it, becomes a subject of equitable bar to redemption, notwithstanding a clear title to redemption in the

has paid neither principal nor interest, and there have been no dealings between him and the mortgagee, there is presumptive evidence of foreclosure.[1]

1159. After a mortgagee in possession has received payment of the debt, he really holds the property in trust for the mortgagor, and the statute of limitations will not run in his favor until by some further act he shows that his possession and claim have become adverse. This rule is equally applicable to the case of an absolute deed given to secure a debt and treated by the law as a mortgage.[2] The statute does not begin to run against the right to redeem such a mortgage until a tender and refusal of the money secured by it;[3] or at least until the mortgagee denies the right of the mortgagor to redeem and the mortgagor has actual notice of such denial, or of the mortgagee's adverse holding, as in cases where the mortgagee has entered under an agreement to account for the rents.[4]

The possession of a mortgagee after he has received payment of the debt will not be regarded as a holding adversely to the mortgagor, unless some act other than mere possession under the mortgage be shown to establish the adverse character of his possession. After payment he holds the premises for the mortgagor as a trustee.[5]

1160. The right to redeem a junior mortgage accrues at its maturity, so that the statute of limitations then begins to run against it; though it has been suggested that it may begin to run upon the maturity of the prior mortgage.[6]

The right of a remainder-man to redeem from a mortgagee in possession under the owner of the precedent estate does not begin to run until that estate is terminated.[7]

1161. After a foreclosure sale the statute runs from the expiration of the year of redemption. Where a purchaser under a foreclosure sale relied upon the statute of limitations to sustain

one party, and on the other a continued misapplication of the rents and profits of the estate committed to his care, contrary to his engagement, and a continued breach of duty, from the beginning to the end of the period, in omitting to keep the account." Cholmondeley *v.* Clinton, 2 Jac. & W. 187, per Sir Thomas Plumer, Master of the Rolls.

[1] Hurd *v.* Coleman, 42 Me. 182; Blethen *v.* Dwinal, 35 Me. 556; Phillips *v.* Sinclair, 20 Me. 269.

[2] Green *v.* Turner, 38 Iowa, 112.

[3] Wilson *v.* Richards, 1 Neb. 342.

[4] Yarbrough *v.* Newell, 10 Yerg. (Tenn.) 376; Hammonds *v.* Hopkins, 3 Ib. 525.

[5] Green *v.* Turner, *supra.*

[6] Gower *v.* Winchester, 33 Iowa, 303.

[7] Fogal *v.* Pirro, 17 Abb. (N. Y.) Pr. 113; *S. C.* 10 Bosw. 100.

his title against redemption by the mortgagor, it appeared that the suit to redeem was commenced about twenty-one years after the recovery of judgment in the foreclosure suit and the sale under it, but a little less than twenty years from the time the purchaser was entitled to a deed of the land, one year being allowed by law after the sale for redemption. It was held, however, that the suit to redeem was seasonably brought, because the mortgagor was entitled to the possession during the year without any liability to account for the rents and profits, and the purchaser in the mean time had only a certificate of purchase, and no legal title or right to the property vested in him until he received a deed from the officer after the expiration of the year. The mere recovery of judgment did not terminate the relation of mortgagor and mortgagee, and during the year allowed for redemption the mortgage remained a lien upon the premises.[1]

1161 *a*. A lapse of time less than that prescribed by the statute of limitations may be a bar to redemption. Thus, a mortgagor who, knowing that the property has been sold under foreclosure, waits more than seven years before taking any step to assert his rights, cannot then claim that the sale was void on account of his imprisonment at the time of the sale, though he was released a few months afterwards. His claim to redeem will be adjudged stale.[2]

III. *What prevents the Running of the Statute.*

1162. An acknowledgment will not be inferred from equivocal expressions. A mortgagee, in answer to a letter written him by the solicitor of a subsequent incumbrancer, replied by letter, saying: "I deny, though with all due courtesy, the claim of your client. I need only add that, if he were entitled to the account, it would be of no use, as the rents and profits of the estate have never been sufficient to pay the interest of the first charge." It was contended that by this letter he acknowledged that he held under a mortgage title, and that this was all that was necessary; but the Master of the Rolls said that this view was a misapprehension of what is required in an admission, which must be, not that the mortgagee holds under a mortgage title, but that some one has the right to redeem. "This letter, beginning as it did with an express denial of the plaintiff's claim, could not be treated as an acknowledgment of his right to redeem. If this

[1] Rockwell *v.* Servant, 63 Ill. 424.

[2] Fraker *v.* Houck, 36 Fed. Rep. 403.

were so, no one could safely answer a solicitor's letter except to say that he refused to give any reply."[1]

1163. An acknowledgment made after the expiration of the twenty years by the mortgagee while in possession has the same effect as one made before, not only as against himself, but also as against all persons claiming under him, or claiming an estate in remainder.[2] "If his admission had any effect at all, it must have restored the original character of the mortgage, and must have given to those entitled to redeem the right of recovering the legal estate on payment to him of the mortgage money in his character of executor."[3] But it is said that after the twenty years have passed, stronger words and acts are required to constitute an admission of the right of redemption than would have been requisite while the mortgagor clearly had this right.[4]

1164. Acknowledgment to a third person. — Except as required by recent statutes, an acknowledgment of the mortgage as a subsisting security would operate to keep the right of redemption open, although not made to the mortgagor, but in transactions with other persons, and to which the mortgagor was a stranger, as in an assignment or deed to a third person. In England, since the statute of 3 & 4 Will. 4, ch. 27, the admission must be made to the mortgagor himself,[5] or to his agent,[6] though this requirement has been the subject of some criticism.[7] An assignment of the mortgage subject to redemption is then no longer a sufficient acknowledgment, because the assignee is not a claimant of the mortgagor's estate, but of the mortgagee's;[8] unless, however, the mortgagor or one claiming under him be made a party to the assignment, when the requirement would be answered.[9]

1165. The mortgagee's acknowledgment is binding upon all who hold under him, as, for instance, his lessee.[10] And so

[1] Thompson *v.* Bowyer, 9 Jur. N. S. 863; *S. C.* 11 W. R. 975.

The Master of Rolls, Lord Romilly, declared the authorities on the question, what constitutes a sufficient acknowledgment, to be difficult to reconcile.

[2] Pendleton *v.* Rooth, 1 Giff. 35; *S. C.* 1 De G., F. & Jo. 81; Stansfield *v.* Hobson, 3 De G., Mac. & G. 620; *S. C.* 16 Beav. 236.

This rule applies since the passing of the statute of Will. 4 as well as before.

[3] Per Sir John Stuart, Vice-Chancellor, in Pendleton *v.* Rooth, *supra.*

[4] Whiting *v.* White, Coop. 1; *S. C.* 2 Cox, 290; Barron *v.* Martin, G. Coop. 189.

[5] Lucas *v.* Dennison, 13 Sim. 584.

[6] Trulock *v.* Robey, 12 Sim. 402; *S. C.* 2 Ph. 396.

[7] Stansfield *v.* Hobson, 3 De G., Mac. & G. 620.

[8] Lucas *v.* Dennison, *supra.*

[9] Batchelor *v.* Middleton, 6 Hare, 75.

[10] Ball *v.* Riversdale, Beat. 550.

persons claiming in remainder under the mortgagee's will are bound by an admission of the mortgage title, made by his devisee in tail subject to remainders over, by a purchase of the title of the owners of the equity of redemption, notwithstanding they had been out of possession more than thirty years prior to the mortgagee's death: their title was revived by the acknowledgment, and the tenant in tail by means of it acquired the absolute ownership as against the devisees in remainder.[1]

1166. By rendering an account. — There are many cases in which it has been held that the rendering by the mortgagee of an account of the amount due upon the mortgage within twenty years after his entry does away with the presumption of title in him, and lets the mortgagor in to redeem.[2] Whether accounts kept by the mortgagee in his own books would have this effect without some communication on the subject to the mortgagor may well be doubted.[3] Accounts kept by the mortgagee's agent, and delivered to the mortgagor without authority, are held not to have this effect.[4] Under statutes requiring the acknowledgment to be made to the mortgagor or his agent, it would seem to be clear that a mortgagee's account of rents received by him would not have the effect of defeating the bar created by his possession unless communicated in writing directly to the mortgagor or his agent.[5]

1167. Acknowledgment by letter. — An acknowledgment by a mortgagee in the way of a letter written by him to the mortgagor or his solicitor is sufficient.[6] A mortgagee having been in

[1] Pendleton *v.* Rooth, 1 De G., F. & Jo. 81; *S. C.* 1 Giff. 35; 5 Jur. N. S. 840; 6 Ib. 182.

[2] Edsell *v.* Buchanan, 2 Ves. Jun. 83, and cases cited; Procter *v.* Cowper, 2 Vern. 377; Anon. 2 Atk. 333; Hodle *v.* Healey, 6 Madd. 117.

[3] Barron *v.* Martin, 19 Ves. 327; Fairfax *v.* Montague, cited 2 Ves. Jun. 84; Campbell *v.* Beckford, cited 4 Ves. 474; Lake *v.* Thomas, 3 Ves. Jun. 17, 22; Hansard *v.* Hardy, 18 Ves. 455; Price *v.* Copner, 1 S. & S. 347.

[4] Barron *v.* Martin, G. Coop. 189.

[5] See Baker *v.* Wetton, 14 Sim. 426; Richardson *v.* Younge, L. R. 10 Eq. 275.

[6] Stansfield *v.* Hobson, 3 De G., M. & G. 620; *S. C.* 16 Beav. 236. It was contended in this case that the right of redemption was not acknowledged to any particular person in accordance with the statute 3 & 4 Will. 4, ch. 27, § 28. See statute quoted § 1171. But Lord Justice Knight Bruce said that the letter must be understood as acknowledging a title to redeem in the person on whose behalf the solicitor wrote.

It was also contended that the acknowledgment was conditional upon some one being ready to pay the money. "I think, however," said Lord Justice Turner, "that the letter could not mean that one was to be ready at the moment with the money, because accounts had to be taken, and the balance ascertained. The letter therefore appears to me to have left it open to the mortgagor to come to this court to have the balance ascertained

possession more than twenty years, the solicitor of the mortgagor wrote to him requesting to know where he could see him upon the subject of the mortgage. The mortgagee replied by letter, saying, "I do not see the use of a meeting either here or at Manchester, unless some party is ready with the money to pay me off." It was held that this was a sufficient acknowledgment by the mortgagee that he held a redeemable estate in the property to exclude the application of the statute of limitations.

1168. Acknowledgment may be made by an assignment of the mortgage as security for a debt, or by any form of an assignment which treats the mortgage as redeemable.[1] It does not matter that the mortgagor is not a party to the transaction.

Now under the English statute, however, an assignment of a mortgage subject to the equity of redemption is not a sufficient acknowledgment to make the estate redeemable, because it is not an acknowledgment made to the party entitled to the equity of redemption.[2] But aside from this requirement, such an assignment would be an acknowledgment of the mortgage title such as would make a renewal of it from that time.

1169. By recital in deed. — In like manner the recital of the mortgage in a deed by the mortgagee is a sufficient admission of it,[3] and so is the recital of it in his will, by which he directs a certain disposition of the money in case the mortgage should be redeemed.[4] But under a statute requiring the acknowledgment to be made to the mortgagor or his agent, a recital in a deed to a third person or in a will is insufficient.[5]

1170. By commencing proceedings to foreclose the mortgage the mortgagee recognizes it as a subsisting lien, either by action or by advertisement, and the mortgagor may thereafter, within twenty years, file a bill for redemption and for an account of the rents and profits.[6] Such, too, is the effect of proceedings

upon the statement that he was ready to pay off the money."

[1] Hardy *v.* Reeves, 4 Ves. Jun. 466; Smart *v.* Hunt, Ib. 478, note; Borst *v.* Boyd, 3 Sandf. (N. Y.) Ch. 501.

[2] Lucas *v.* Dennison, 13 Sim. 584.

Upon this requirement of the statute Vice-Chancellor Wigram, in Batchelor *v.* Middleton, 6 Hare, 75, remarked: "Why, however, the mortgagee should not be allowed to make an admission (in writing, signed by himself) of his mortgage title to a third person, of which the mortgagor may have the benefit, I do not know; but the statute requires that the admission should be made to the mortgagor himself, and by that I am bound."

[3] Hansard *v.* Hardy, 18 Ves. 455.

[4] Ord *v.* Smith, Sel. Cas. in Ch. 9; *S. C.* 2 Eq. Cas. Abr. 600.

[5] Lucas *v.* Dennison, *supra.*

[6] Robinson *v.* Fife, 3 Ohio St. 551; Calkins *v.* Calkins, 3 Barb. (N. Y.) 305. In this case the mortgagee had been in

taken meanwhile to enforce the mortgage debt, although they be irregular and ineffectual.[1] It would be wholly inconsistent for the mortgagee to claim that there is no right of redemption after he has undertaken by such proceedings to bar such a right. The giving of notice under a power of sale, or under a statute regulating foreclosure by advertisement, is an admission of a right to redeem. This is in effect an invitation to the owner of the equity of redemption to pay the amount of the debt and redeem the estate, if he so chooses; and the mortgagee cannot object if he accepts the invitation.[2]

The acknowledgment may also be found in an answer to a suit in equity.[3]

1171. A verbal acknowledgment of the mortgage as a subsisting security is sufficient to prevent the possession from operating as a bar if the evidence be clear and unequivocal.[4] Lord Alvanley, commenting upon the admissibilty of such evidence, said: "I cannot help thinking that it would have been a very wise rule if no parol evidence had been admitted upon these subjects."[5] Mr. Justice Story, quoting this opinion with approval, says: "Such admissions and acknowledgments are certainly open to the strong objection, that they are easily fabricated, and difficult, if not impossible, to be disproved in many cases, and that they have a direct tendency to shake the security of all titles under mortgages, even after a very long exclusive possession by the mortgagee; nay, even after the possession of a half century."[6]

The objections to such evidence have been found to be so great that the modern statutes of limitation in England provide not only that an acknowledgment, to be effectual as a recognition of

possession almost twenty years prior to the proceeding to foreclose.

[1] Jackson *v.* De Lancey, 11 Johns. (N. Y.) 365; aff'd 13 Ib. 537; Cutts *v.* York Manuf. Co. 18 Me. 190.

[2] Calkins *v.* Isbell, 20 N. Y. 147, aff'g 3 Barb. 305; Jackson *v.* Slater, 5 Wend. (N. Y.) 295.

[3] Goode *v.* Job, 1 El. & El. 6.

[4] Reeks *v.* Postlethwaite, Coop. 161; Lake *v.* Thomas, 3 Ves. Jun. 17; Barron *v.* Martin, 19 Ves. 327; Perry *v.* Marston, 2 Bro. Ch. 397, per Lord Thurlow; Dexter *v.* Arnold, 3 Sumn. 152; Marks *v.* Pell, 1 Johns. (N. Y.) Ch. 594. "Such acknowledgments," says Chancellor Kent, "are generally a dangerous species of evidence." See, also, Morgan *v.* Morgan, 10 Ga. 297, 304.

[5] Whiting *v.* White, 2 Cox, 290, 300; Cooper 1.

[6] In Dexter *v.* Arnold, 3 Sumn. 152, 160. "I have not in my researches," says Judge Story, "found any other cases upon the point. And, what is very remarkable, there is no instance of a decree being made upon such parol evidence in favor of the party seeking to redeem. In the present case I am spared the necessity of deciding the general principle."

the mortgage, must be in writing, signed by the mortgagee, or the person claiming through him ; and also that it must be made to the mortgagor, or some person claiming his estate, or to his agent.[1] If the writing complies with these conditions no particular form is required under this statute. The amount due need not be stated.[2] An acknowledgment by one of several mortgagees is binding only upon himself and those claiming under him, and enables the mortgagor to redeem only his estate or interest in the property.[3] This provision applies only to mortgagees holding interests in severalty, and not as joint tenants. An acknowledgment by one joint mortgagee who is a trustee is entirely inoperative ; all must join in it to take the case out of the statute.[4]

1172. The filing of a bill to redeem stops the running of the statute. A mere demand by the mortgagor or the owner of the equity of redemption to be allowed to redeem does not prevent the running of the statute,[5] unless accompanied by a tender of the amount due upon the mortgage, as provided by statute in some states, and followed by a suit within a year or other specified time. The commencement of a suit to redeem is sufficient to save the right against the statute although the bill be filed merely, without any service of it, before the expiration of the twenty years' possession. The filing of the bill is the commencement of

[1] Under statute 3 & 4 Wm. 4, ch. 27, § 28, "an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him."

[2] Stansfield *v.* Hobson, 16 Beav. 236; *S. C.* 3 De G., Mac. & G. 620; Trulock *v.* Robey, 12 Sim. 402 ; *S. C.* 2 Ph. 396 ; St. John *v.* Boughton, 9 Sim. 219.

[3] See statute quoted § **1146**.

[4] Richardson *v.* Younge, L. R. 10 Eq. 275 ; *S. C.* 6 Ch. App. 478. The views of the question presented in this case, in argument upon appeal, were : 1. That the acknowledgment of one trustee bound both. 2. That it bound a half interest, and enabled the mortgagor to redeem half of the estate upon paying half the debt. 3. That it bound neither. "It appears to me," said Lord Justice James, in giving judgment, "to be the best construction of this involved and difficult section, to hold that the provisions as to acknowledgment by some of several mortgagees apply only where they have separate interests, either in the money or the land. I do not think that Mr. Wilson had any separate interest either in the money or the land. He was simply joint tenant with his co-trustee of the land, and jointly entitled with him to the mortgage money. Had the mortgagees not been trustees, the case would have stood very differently, for they must, almost of necessity, have been entitled to some distinct interests in the mortgage money. And if they had been partners, difficult questions might have arisen ; but in the present case, which is simply that of trustees, I agree with the conclusion of the Vice-Chancellor."

[5] Hodle *v.* Healey, 1 V. & B. 536.

the suit.[1] But the plaintiff may, by unwarranted delay in the prosecution of the suit, lose all benefit of it.[2]

1173. The statute of limitations must be pleaded in order to secure the protection of it.[3] It may be pleaded by answer as a defence,[4] or, in case it appears on the face of the plaintiff's bill that the mortgagee has been in possession for twenty years, without acknowledgment of the mortgage title, by demurrer.[5] But such possession must appear by dates positively stated, and not to be made out by inference, or argument,[6] or presumption.[7]

[1] Van Vronker *v.* Eastman, 7 Met. (Mass.) 157.

[2] Forster *v.* Thompson, 4 Dr. & War. 303; Coppin *v.* Gray, 1 Y. & C. C. C. 205.

[3] Fordham *v.* Wallis, 10 Hare, 217, 231; *S. C.* 17 Jur. 228.

[4] Batchelor *v.* Middleton, 6 Hare, 75; Adams *v.* Barry, 2 Coll. 285; Aggas *v.* Pickerell, 3 Atk. 225.

[5] Foster *v.* Hodgson, 19 Ves. 180; Hoare *v.* Peck, 6 Sim. 51; Baker *v.* Wetton, 14 Sim. 426; Jenner *v.* Tracy, 3 P. Wms. 287, n.

[6] Edsell *v.* Buchanan, 2 Ves. Jun. 83; *S. C.* 4 Bro. C. C. 254.

[7] Baker *v.* Wetton, *supra;* Green *v.* Nicholls, 4 L. J. Ch. 118.

CHAPTER XXV.

WHEN THE RIGHT TO ENFORCE A MORTGAGE ACCRUES, 1174-1191.

1174. In general the right of action accrues upon the non-payment of the principal or interest at the time fixed for payment.[1] If it be shown by agreement of the parties at the time of the execution of a bond payable on demand, that it was not to be paid till a future specified time, the statute of limitations will be considered as beginning to run only from the time agreed upon for payment.[2] If no time of payment is fixed, the debt is payable on demand, and the right to enforce it accrues immediately.[3] And so if by the express terms of the mortgage the debt is payable on demand, the mortgagee may foreclose by suit at any time without a previous demand other than the commencement of the suit.[4]

But if the condition of a mortgage given to secure a note payable on demand be that if the note be paid "within sixty days after such demand," the mortgage shall be void, a demand of payment is necessary to work a breach of the condition, and no right of action accrues until sixty days have elapsed after demand.[5]

No effectual sale under a power or by decree of court in a foreclosure suit can be made until the occurrence of the event upon the happening of which a sale or foreclosure is authorized.[6]

A mortgage cannot be foreclosed before it is due or there is a

[1] Gladwyn *v.* Hitchman, 2 Vern. 135.

[2] Hale *v.* Pack, 10 W. Va. 145.

[3] Eaton *v.* Truesdail, 40 Mich. 1; Rhoads *v.* Reed, 89 Pa. St. 436.

[4] Gillett *v.* Balcom, 6 Barb. (N. Y.) 370; Union Cent. L. Ins. Co. *v.* Curtis, 35 Ohio St. 357; Hill *v.* Henry, 17 Ohio, 9; Darling *v.* Wooster, 9 Ohio St. 517.

[5] Union Cent. L. Ins. Co. *v.* Curtis, 35 Ohio St. 343. The mortgage in this case was to an insurance company, and it was provided that the demand should be made by the auditor of the company; but it was held that this provision was intended to operate only in case the mortgage should be within his control; but may be made by an assignee of the mortgage. But if demand be made by an agent of the owner, mere possession of the note is not proof of the agency. Union Cent. L. Ins. Co. *v.* Jones, 35 Ohio St. 351.

[6] Eitelgeorge *v.* Mutual House Building Asso. 69 Mo. 52; Felton *v.* Bissel, 25 Minn. 15.

breach of some condition, although in a suit to foreclose a subsequent mortgage on the same property the holder of the prior mortgage not yet due is made a party defendant, and he files a cross-bill asking the foreclosure of his mortgage. The subsequent mortgage must be foreclosed by a sale, subject to the lien of the prior mortgage. The whole estate cannot be sold for the payment of both mortgages.[1]

A mortgagor may waive a credit secured to him by the terms of the mortgage and consent to an immediate foreclosure; and if the mortgagee be in possession, or have the right of possession, an execution creditor of the mortgagor, or a purchaser of the equity of redemption upon execution sale, cannot object that the debt is not due, except upon a bill to redeem.[2]

1175. **The right to foreclose may be made to depend upon events other than the lapse of time** which generally determines the right;[3] or the nature of the security may be such that an event not contemplated, or provided for by the parties, may give this right; as where the mortgage secures the fulfilment of an executory agreement which is to run for three years, and the insolvency of the mortgagor within that time puts it out of his power to fulfil the agreement; and therefore this works a breach of it, and gives the mortgagee the right to foreclose immediately.[4]

Thus also a mortgage may be conditioned that the mortgagor shall pay, within a fixed time, all debts contracted by him for labor and material for the construction of a building. In such case a default occurs when there are any debts outstanding which would be a lien against the building.[5]

Where a mortgage was given to secure certain promissory notes, conditioned "that, if any of the notes prove to be insolvent or worthless, the mortgage is to be good and valid, otherwise to be null and void," it was held that to constitute a breach some of the notes must prove worthless, or the makers insolvent. Non-payment alone did not constitute a breach.[6]

It is very generally provided by the terms of the mortgage that the mortgagee shall have the right to sell on the failure of the

[1] Trayser *v.* Indiana Asbury University, 39 Ind. 556.

[2] Morton *v.* Covell, 10 Neb. 423.

[3] Delano *v.* Smith, 142 Mass. 490.

[4] Harding *v.* Mill River Woollen Manuf. Co. 34 Conn. 458.

[5] Houston *v.* Nord (Minn.), 40 N. W. Rep. 568. The mortgage was construed to be one not of indemnity merely.

[6] Felrow *v.* Merriwether, 53 Ill. 275.

owner to pay the taxes assessed on the premises, and in such case a default in this particular gives the right to sell as effectually as when the default consists in the non-payment of the principal sum secured.[1] And so a condition in a mortgage, that in case the taxes upon the premises shall remain unpaid after a certain date in any year the whole debt shall become due, is equally binding and operative as a like condition in respect to the non-payment of any instalment of the principal or interest, and the court has no power to relieve the person in default from the consequences of it.[2] But where the mortgage merely provides that the mortgagor shall pay the taxes upon the premises, and in default of so doing that the mortgagee may discharge the same and collect them as a part of the mortgage debt, then the failure of the mortgagor to pay them is not such a default as will give the right to foreclose. And even if it be further provided that on default in the payment of the principal sum or interest, or of the taxes as provided, the mortgagee may sell, and out of the moneys arising from such sale retain the whole debt and interest, together with "such taxes and charges as shall have been paid by him," the right to sell on account of the taxes alone does not arise until the mortgagee has himself paid the taxes, because until then no money has become due which he is entitled to retain on a sale.[3]

1176. A failure to pay an instalment of interest or principal when due is a default within the meaning of a mortgage or trust deed which authorizes a sale to be made upon the happening of any default,[4] although the deed does not show when the interest is payable or what the rate of it is, except by reference to the note secured.[5] In such case a subsequent purchaser of the

[1] Pope *v.* Durant, 26 Iowa, 233; Harrington *v.* Christie, 47 Iowa, 319.

[2] O'Connor *v.* Shipman, 48 How. (N. Y.) Pr. 126.

[3] Williams *v.* Townsend, 31 N. Y. 411.

[4] Stanhope *v.* Manners, 2 Eden, 197; Goodman *v.* Cinn. & Chicago R. R. Co. 2 Disney (Ohio), 176; West Branch Bank *v.* Chester, 11 Pa. St. 282; Burt *v.* Saxton, 1 Hun (N. Y.), 551; Kelly *v.* Kershaw, 14 Pac. Rep. 804; *S. C.* 16 Ib. 488.

Where a mortgage is foreclosed by an assignee for non-payment of interest, the assignor will not be allowed to prove that all the interest for the whole term of the mortgage, which had several years to run, had been paid to him in advance. Newton Building & Loan Asso. *v.* Boyer, 42 N. J. Eq. 273.

For a case where time of payment of interest, and consequent right to foreclose for non-payment, were not affected by an agreement whereby the possession with the mortgagee's consent is delivered to a person who makes further advances, which are to be a first lien upon the property, and a final settlement is to be made at the end of three years, see South St. Louis Ry. Co. *v.* Plate (Mo.), 5 S. W. Rep. 199.

[5] Richards *v.* Holmes, 18 How. 143.

mortgaged premises cannot insist that there was no power to sell for non-payment of such interest, because the mention of interest in the deed as reserved by the note is sufficient to put him upon inquiry as to the rate and time of payment of the interest.

If the condition of a mortgage given to secure several notes maturing at different times be, that if the mortgagor shall pay all the notes as they become due, then the mortgage shall become null and void, a failure to pay any note when it falls due is a breach of the condition.[1]

1177. Default in the payment of the yearly or half-yearly interest at the times stipulated in the mortgage is held by high authority to give the right to foreclose immediately, although the period for payment of the principal sum has not arrived, and there is no provision specifically making a forfeiture of the principal upon a default in the payment of the interest.[2] A *dictum* of Lord Chancellor Sugden is much relied upon as establishing this doctrine: that, "default having been made in the payment of the interest thereon, the mortgagee would at any time after that event have had a right to file his bill for a foreclosure; because his right became absolute at law by the non-payment of the interest, the estate having been conveyed subject to a condition which had not been fulfilled."[3] This was followed in the case of *Edwards* v. *Martin*,[4] notwithstanding that the mortgagee had taken possession of the property, consisting of certain leasehold estates, and had realized by a sale of a portion more than enough to cover the interest due. Kindersley, Vice-Chancellor, said: "It is certainly singular that this question has never before been decided; but, in the absence of any direct authority, the *dictum* of Lord St. Leonards is sufficient for me to act upon when I consider that, upon the whole, that *dictum* is in accordance with the justice of the case."

Where upon a sale of land the purchaser retained a portion of the purchase money as indemnity against an incumbrance, and gave the grantor a bond and mortgage for the money retained, payable with lawful interest on the extinguishment of the claim,

[1] Fisher *v.* Milmine, 94 Ill. 328.

[2] Butler *v.* Blackman, 45 Conn. 159; Dederick *v.* Barber, 44 Mich. 19; Gladwyn *v.* Hitchman, 2 Vern. 135.

In this case a mortgage was made for £450, payable at the end of five years, with interest at the rate of £5 per cent. in the mean time. The interest not being paid as stipulated, the mortgage was treated as forfeited.

[3] Burrowes *v.* Molloy, 2 Jones & L. 521.

[4] 25 Law J. N. S. Ch. 284.

it was held that the mortgage could be foreclosed for arrears of interest, although the principal had not become due through the removal of the incumbrance.[1]

Under an agreement for a mortgage, the court, in settling the terms of the mortgage to be given in pursuance of it, will ordinarily insert a proviso that the postponement shall be conditional on punctual payment of interest, although the agreement be silent upon the subject; so that if the mortgagor should make default in the payment of interest, the mortgagee's remedy by sale or foreclosure will immediately arise.[2]

1178. But the agreement in respect to the payment of the principal may be such that a default in the payment of the interest will give no right to institute proceedings for foreclosure; as, for instance, where it is provided that the principal shall not be called in during the lifetime of the mortgagor; though a yearly interest is reserved, a default in the payment of the interest during the lifetime of the mortgagor gives no right of action.[3]

[1] Van Doren *v.* Dickerson, 33 N. J. Eq. 388.

[2] Seaton *v.* Twyford, L. R. 11 Eq. 591.

[3] Burrowes *v.* Molloy, 2 Jones & L. 521. Lord Chancellor Sugden said: "Supposing that the principal sum had been made payable on a given day, no matter whether it was one year or twenty years after the date of the mortgage, with interest thereon half-yearly in the mean time, and that, before the day of payment of the principal money, default had been made in the payment of the interest thereon, the mortgagee would, at any time after that event, have had a right to file his bill for a foreclosure; because his right became absolute at law by the non-payment of the interest, the estate having been conveyed subject to a condition which had not been fulfilled. . . . This transaction assumed a different shape with respect to the payment of the principal and the payment of the interest; it was only upon the non-payment of the principal sum, after the decease of the mortgagor, that the mortgagee was to have a right to foreclose. Interest was to be paid half-yearly upon the principal sum; and after the decease of the mortgagor any default in the payment of the interest would enable the mortgagee to file his bill of foreclosure, because the condition would then have been broken; but the covenant is independent of everything contained in the deed of mortgage, and is in point of fact an absolute covenant, that, notwithstanding anything contained in the mortgage deed, the mortgagee will not call in the principal money during the lifetime of the mortgagor. I do not see how any default in the payment of the interest, during the lifetime of the mortgagor, can enable the mortgagee to commit a breach of his covenant. It was said that this was like a case where, although the money was by the proviso for redemption to be paid at a fixed period, yet the mortgagee covenants that he will not call in the principal for a longer period, unless default should be made in the payment of the interest in the mean time; but the parties here have not entered into such an arrangement. I think, therefore, that under these instruments the plaintiff was not at liberty to file his bill for a foreclosure, as far as relates to the principal money; and therefore cannot do so in respect of the interest which accrued before the principal sum became payable."

If the mortgage contains an absolute covenant that the principal shall not be called in during a specific period, or until the happening of a certain event, then no default in the payment of the interest in the mean time will enable the mortgagee to sue.[1] Such a covenant may prevent a mortgagee's suing upon a salvage claim, as, for instance, upon a prior mortgage which he has been obliged to take up for his own protection; although that has matured, the covenant in his own mortgage will prevent his enforcing it during the time included in his covenant.[2]

When it appears upon the whole mortgage deed that although the principal and interest are expressed to be payable at the end of several years, yet it was the intention and agreement of the parties that the interest should be paid half yearly, the mortgagee may foreclose upon a default in the payment of the interest in the mean time.[3]

1179. It is competent for the parties to so provide that the continuance of the loan shall depend upon the promptness of the borrower's paying the interest, or the instalments of principal.[4] It is competent, also, for the parties to provide that upon a default of the mortgagor in the payment of the taxes assessed upon the premises the whole mortgage debt shall become due.[5] When the mortgage provides that upon any default in the payment of interest the principal sum shall immediately, or after the continuance of the default for a specified time, become due, time is made the essence of the contract, and a court of equity will not relieve the mortgagor from a default, unless he can show some good excuse for it, such as mistake or accident or fraud.[6] The time of payment may be extended by a parol agreement so that there will be no default within the meaning of the deed, because this is made with the concurrence of the creditor. Although such

[1] Fisher on Mortgages, 3d ed. 347.

[2] Burrowes *v.* Molloy, 2 Jones & L. 521. See Dugdale *v.* Robertson, 3 Jur. N. S. 687, as to suit for injuries to the security in such case.

[3] Roddy *v.* Williams, 3 Jones & L. 1. See Wisner *v.* Chamberlin, 117 Ill. 568.

[4] Cassidy *v.* Caton, 47 Iowa, 22; *S. C.* 7 Reporter, 335; Stanclift *v.* Norton, 11 Kans. 218; Whitcher *v.* Webb, 44 Cal. 127.

[5] Stanclift *v.* Norton, *supra.*

[6] Terry *v.* Eureka College, 70 Ill. 236; Heath *v.* Hall, 60 Ill. 344; Beisel *v.* Artman, 10 Neb. 181; Baldwin *v.* Van Vorst, 10 N. J. Eq. (2 Stockt.) 577; Anderson *v.* Lodi Branch R. R. Co 31 N J. Eq. 42; De Groot *v.* McCotter, 19 N. J. Eq. 531; Albert *v.* Grosvenor Investment Co. 8 Best & S. 664; *S. C.* L. R. 3 Q. B. 123. Per Lush, J.: "The word 'default' imports something wrongful, — the omission to do something which, as between the parties, ought to have been done by one of them. Therefore the omission of the plaintiff to pay on the day specified, being with the concurrence of the defendants, was not a default."

an agreement be not binding for want of consideration, and therefore is subject to revocation at any moment, it is a sufficient excuse for the default. The creditor cannot treat it as a default working forfeiture, without first demanding payment of the instalment.

Where it was provided that in case the interest should remain due and unpaid for ten days, the principal should become due, and the owner of the equity paid the interest after that time and took a receipt as of the day when it fell due, it was held to be a waiver of the forfeiture, so that the mortgagee could not proceed to foreclose.[1] Neither will the court enforce a forfeiture of the time of credit if the failure to pay the interest within the time specified was occasioned by the acts or declarations of the holder of the mortgage;[2] as where by agreement of the parties the payment of interest had been regularly made at the place of business of the mortgagor, and the payment on which the forfeiture of credit was claimed occurred because the mortgagee had not called for the interest, and the mortgagor did not know where to find him;[3] or where the owner of the equity tendered the amount due, which the mortgagee refused to receive;[4] or where the mortgagee had paid over to the mortgagor only a part of the consideration of the mortgage at the time of the default.[5]

It is not essential that this provision shall be contained in both the mortgage and note. When these instruments are executed at the same time with regard to the same transaction, and make reference to each other, they are but one in the eye of the law, and the terms of either are qualified by any provisions of the other applicable thereto.[6] If the note states that it is secured by mortgage, a provision of the latter that upon default in the payment of interest the whole debt secured shall become due and payable becomes in law a part of the former.[7] A similar provision in the

[1] Sire *v.* Wightman, 25 N. J. Eq. 102. For circumstances under which the receipt of interest will not be regarded as a waiver of forfeiture, see Odell *v.* Hoyt, 73 N. Y. 343.

[2] Wilson *v.* Bird, 28 N. J. Eq. 352.

[3] De Groot *v.* McCotter, 19 N. J. Eq. 531. The order in this case was that upon payment to the complainant, within ten days, of the amount then due, all proceedings upon the mortgage be stayed, until default be made according to the condition of the mortgage, without reference to default in the payment of interest moneys previously due.

[4] Ewart *v.* Irwin, 1 Philad. 78 (7 Leg. Int. 134). Although this was a writ of *scire facias* the court applied equitable principles of construction.

[5] Booknau *v.* Burnett, 49 Iowa, 303.

[6] Buchanan *v.* Berkshire L. Ins. Co. 96 Ind. 510, 520.

[7] Gregory *v.* Marks, 8 Biss. 44; Noell *v.* Gaines, 68 Mo. 649; Hough, J., dis-

note qualifies in the same way the legal effect of the mortgage from which the provision is omitted.[1]

If there be a discrepancy between the terms of the mortgage and those of the bonds secured thereby, inasmuch as the debt is the principal thing, and the mortgage only a security, the terms of the description of the debt will govern. Thus, if a mortgage executed by a corporation, to secure its bonds, provides that in case of default for six months in the payment of the interest upon either of them, the entire amount of the debt secured "shall forthwith become due and payable," and that the lien of the mortgage may be at once enforced, and the bonds themselves declare that, "in case of the non-payment of any half-yearly instalment of interest which shall have become due and been demanded, and such default shall have continued six months after demand," the principal of the bond shall become due, with the effect provided in the mortgage, a demand for payment is necessary to make the principal of the bonds payable.[2]

Under a mortgage which provides that the whole principal debt shall become due in case default be made for a certain period in the payment of interest, it need not be averred, in a bill to foreclose the mortgage, that demand was made for the payment of the interest; or, if the mortgage secures bonds with interest coupons, it need not be averred that the coupons were presented for payment at the office or agency at which they were payable.[3]

So completely is the time of payment changed by a provision for the forfeiture of credit upon the breach of a condition of the mortgage, that, in order to charge an indorser of the mortgage note, demand upon the maker and notice to the indorser should be given at the time the mortgagee elects to take advantage of the default and declare the debt to be due. A protest afterwards upon the maturity of the note according to its terms, without reference to the forfeiture, is of no effect.[4]

An indorser may waive any right he had to have the note protested, by promising payment and applying for a postponement of sale.[5]

The general rule, however, is, that in the absence of any agree-

senting; *S. C.* 8 Cent. L. J. 353; Waples *v.* Jones, 62 Mo. 440; Schoonmaker *v.* Taylor, 14 Wis. 313.

[1] Fletcher *v.* Daugherty, 13 Neb. 224.

[2] Railway Co. *v.* Sprague, 103 U. S. 756.

[3] Savannah & Memphis R. R. Co. *v.* Lancaster, 62 Ala. 555.

[4] Noell *v.* Gaines, 68 Mo. 649.

[5] Cardwell *v.* Allan, 33 Gratt. (Va.) 160.

ment that the whole debt shall become due upon a failure to pay any instalment of it, the mortgage cannot be foreclosed in equity until the last instalment has become due.[1]

1180. There is almost always some provision in the mortgage under which the right to foreclose accrues upon a breach of any of the stipulations of the mortgagor to pay, and under which also the mortgagee may receive payment of the whole debt, and not merely of what is due at the time of sale, if it is not then all due.[2] This agreement need not be formal, but may be gathered from the expressed intention of the whole deed. If it appears from the whole instrument that such was the intention, the sale may be made upon any default, and the whole debt paid, though not all due; as where it is provided that on default it should be lawful for the mortgagee to sell and execute a deed, "rendering the surplus, if any," to the mortgagor;[3] or where the condition of a mortgage securing the payment of several notes falling due at different times authorizes a sale upon default being made in the payment of the notes "as they fall due."[4]

But a provision in a power of sale mortgage that, in case of a default for thirty days in the payment of any instalments of interest or of the principal, the mortgagee may advertise and sell, and apply the proceeds to the payment of the whole debt and interest due, only authorizes this application in case of sale under the power, and does not make the whole debt due merely by neglect to pay within the time prescribed. It does not change the time when the instalments of the mortgage become payable, so as to authorize a suit in equity to foreclose the mortgage and to

[1] Harshaw *v.* McKesson, 66 N. C. 266; Hough *v.* Doyle, 8 Blackf. (Ind.) 300. This was by statute.

[2] Bushfield *v.* Meyer, 10 Ohio St. 334; Hosie *v.* Gray, 71 Pa. St. 198, where provision was made for issuing *scire facias;* McLean *v.* Presley, 56 Ala. 211.

Such a provision may be followed by a further provision, that in case of default in the payment of interest on or before the 5th day of any month to the mortgagee's agent, he should take charge of the mortgaged premises, collect the rents, deduct interest, and pay the excess to the mortgagor; and these provisions are not in conflict. Stevens *v.* De Cardona, 53 Cal. 487.

[3] Pope *v.* Durant, 26 Iowa, 233.

But in Bank of San Luis Obispo *v.* Johnson, 53 Cal. 99, a provision in a mortgage that "in case of default in the payment of said note or interest, or in the performance of any of the conditions hereof, then the mortgagee may, at his option, either commence proceedings to foreclose the mortgage in the usual manner, or cause the said premises or any part thereof to be sold," was held not to authorize a foreclosure for the principal upon a default in the payment of interest only. For a similar decision see Jones *v.* Ramsey, 3 Bradw. (Ill.) 303.

[4] McLean *v.* Presley, *supra.*

apply the proceeds of sale immediately to the satisfaction of the mortgage. If the mortgagee chooses to proceed in equity, and the instalment due is paid before sale, he can only apply to the court when future instalments become due for a sale under the decree to satisfy them.[1]

If part of the mortgage notes are payable unconditionally, but one is payable upon condition that the mortgagee shall procure a conveyance of certain interests to the mortgagor, a provision making the whole mortgage debt payable upon any default in the payment of interest or principal enables the mortgagee to sell for the payment of the notes payable unconditionally, but not for the note payable upon condition until the condition is performed.[2]

1181. Such a provision in the mortgage is not considered a penalty, but an agreement as to the time when the debt shall become due.[3] Unless so provided, the foreclosure can extend no further than to enforce satisfaction of such part of the debt as is due at that time, and for that purpose to sell so much of the mortgaged property as may be necessary. Courts of equity, without the aid of any statutory provision to that effect, may generally retain jurisdiction of the case until the subsequent instalments become due, and then decree a further sale; and under the general doctrines and practice of equity may direct a sale of the whole mortgaged estate, though not required for the payment of the instalment already due, in case the property is indivisible;[4] or with the consent of the mortgagor; or in case the court should be satisfied that the property would sell for a better price if sold together in one lot than if sold in parcels at different times.[5] But if the whole premises are sold the remedy is exhausted, and

[1] Holden *v.* Gilbert, 7 Paige (N. Y.), 208.

[2] Gibbons *v.* Hoag, 95 Ill. 45.

[3] Richards *v.* Holmes, 18 How. 143; Cecil *v.* Dynes, 2 Ind. 266; Greenman *v.* Pattison, 8 Blackf. 465; Hunt *v.* Harding, 11 Ind. 245; Hough *v.* Doyle, 8 Blackf. 300; Smart *v.* McKay, 16 Ind. 45; Taber *v.* Cincinnati, &c. R. R. Co. 15 Ind. 459; Magruder *v.* Eggleston, 41 Miss. 284; Grattan *v.* Wiggins, 23 Cal. 16; Jones *v.* Lawrence, 18 Ga. 277; Andrews *v.* Jones, 3 Blackf. 440; Schooley *v.* Romain, 31 Md. 574; Mobray *v.* Leckie, 42 Md. 474; Salmon *v.* Clagett, 3 Bland (Md.), 125; Adams *v.* Essex, 1 Bibb (Ky.), 149; Baker *v.* Lehman, Wright (Ohio), 522; Morgenstern *v.* Klees, 30 Ill. 422; Stillwell *v.* Adams, 29 Ark. 346; Goodman *v.* Cinn. & Chicago R. R. Co. 2 Disney (Ohio), 176; Savannah & Memphis R. R. Co. *v.* Lancaster, 62 Ala. 555, 565. *Contra,* Tiernan *v.* Hinman, 16 Ill. 400; Hoodless *v.* Reid, 112 Ill. 105.

[4] Bank of Ogdensburg *v.* Arnold, 5 Paige (N. Y.), 38.

[5] Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202; Adams *v.* Essex, 1 Bibb (Ky.), 149; Peyton *v.* Ayres, 2 Md. Ch. 64; Wylie *v.* McMakin, 2 Md. Ch. 413.

there can be no second sale upon the maturing of the principal debt.[1]

If other instalments become due after the suit is commenced, and before final hearing, these may be included in the decree without filing a supplemental bill if they are set out in the original bill, and are included in the prayer for decree.[2]

1182. Default at election of mortgagee. — Where it is provided in a mortgage that if any instalment of principal or interest shall not be paid at the times stated, the principal sum secured shall become immediately due at the election of the mortgagee, or the holder of the mortgage, the whole debt is not due until the mortgagee or other holder has exercised his election; and a sale of the property free from the mortgage before this could not be authorized by an act of the legislature.[3] "Immediately due" means immediately upon or after the holder's election; and he is not bound to elect immediately after default.[4] Such a provision does not simply render the notes due for the purposes of foreclosure in case the option is exercised, but for all purposes.[5]

An assignee of part of the notes secured by a mortgage containing such provision cannot alone exercise such option. It is an indivisible condition, to enforce which all parties interested in the mortgage security must unite.[6]

Where the mortgagee has the option to consider the entire debt matured on any default, it is not necessary that any particular form of expression should be used for the purpose of declaring such option. A recital in a mortgagee's deed, under a power of sale in the mortgage, that "having elected to declare said mortgage due and payable, as by said mortgage he was authorized to do, according to the terms and conditions thereof, he had proceeded to exercise the power," is sufficient.[7]

Generally no notice of the mortgagee's election to consider the whole debt due is necessary. His proceeding to enforce the mortgage sufficiently shows his election.[8] An assignee of the mortgagee may also exercise this option in the same way as the mortgagee himself may.

[1] Poweshiek Co. *v.* Dennison, 36 Iowa, 244; Buford *v.* Smith, 7 Mo. 489.

[2] Magrnder *v.* Eggleston, 41 Miss. 284.

[3] Randolph *v.* Middleton, 26 N. J. Eq. 543.

[4] Wheeler & Wilson Manuf. Co. *v.* Howard, 28 Fed. Rep. 741.

[5] Wheeler & Wilson Manuf. Co. *v.* Howard, *supra;* Detweiler *v.* Breckenkamp, 83 Mo. 45.

[6] Marine Bank *v.* International Bank, 9 Wis. 57.

[7] Harper *v.* Ely, 56 Ill. 179.

[8] Harper *v.* Ely, *supra;* Heath *v.* Hall,

In Wisconsin, however, and perhaps elsewhere,[1] it is held that notice of the mortgagee's election to consider the whole sum due must be given before the bringing of a suit for the whole sum.[2] The option must be declared within a short and reasonable time after the right to do so has accrued; and after a delay of six weeks it has been held under some circumstances to be too late to give an effectual notice.[3] A notice given by an attorney of the mortgagee is sufficient, though it does not show the authority on its face. If the mortgagor at the time of receiving notice refuses to pay the mortgage, he cannot object that the mortgagee resides out of the state, and no person is designated to whom payment could be made.[4] Such a provision being unusual, an attorney or officer of a corporation having general authority to execute a mortgage, the terms and conditions of which are not specified, would have no right to insert it; but a mortgage so made would not thereby be void except as to such provision.[5]

A notice in writing by the mortgagee declaring his election is sufficient if left at the residence or place of business of the mortgagor in his absence, with a person of discretion in charge.[6]

Inasmuch as grace is not allowed on an instalment of interest alone, when by the terms of the note interest alone is due on the first day of a month, and, on default of payment thereof within ten days after it becomes due, the mortgagee has his option to declare the whole mortgage debt due, notice of his option given on the twelfth of said month is not premature.[7]

1183. No one but the person for whose benefit a provision for forfeiture of credit is made can take advantage of it. Thus, a covenant in the mortgage of a railroad company to trustees to secure bondholders, "that the principal sum secured by said mortgage shall become due in case the interest on the bonds remains unpaid for four months," if not inserted in the bonds, can only be taken advantage of by the trustees for the foreclosure of

60 Ill. 344; Princeton Loan & Trust Co. *v.* Munson, 60 Ill. 371; Cundiff *v.* Brokaw, 7 Bradw. (Ill.) 147; Hoodless *v.* Reid, 112 Ill. 105; Johnson *v.* Van Velsor, 43 Mich. 208; English *v.* Carney, 25 Mich. 178; Buchanan *v.* Berkshire L. Ins. Co. 96 Ind. 510; Lowenstein *v.* Phelan, 17 Neb. 429.

[1] Redman *v.* Purrington, 65 Cal. 271; Dean *v.* Applegarth, 65 Cal. 391; Leonard *v.* Tyler, 60 Cal. 299; Swett *v.* Stark, 31 Fed. Rep. 858.

[2] Basse *v.* Gallegger, 7 Wis. 442; Marine Bank *v.* International Bank, 9 Wis. 57.

[3] Wilson *v.* Winter (C. C. Wis. 1881), 6 Fed. Rep. 16.

[4] Rosseel *v.* Jarvis, 15 Wis. 571.

[5] Jesup *v.* City Bank of Racine, 14 Wis. 331.

[6] Monroe *v.* Fohl (Cal.), 14 Pac. Rep. 514.

[7] Macloon *v.* Smith, 49 Wis. 200, 201.

the mortgage according to the terms of the authority conferred upon them, and not by an individual bondholder; although upon the bonds there was a certificate signed by the trustees, that such a provision was contained in the mortgage. The mortgage could be foreclosed only upon the written request of the holder of a majority in amount of the bonds; and it was construed to mean that the trustees alone could enforce it, and not that an individual solely or jointly with others should have any right to do so.[1]

This clause is usually inserted for the benefit of the mortgagee; yet it has been held that it may be taken advantage of by the mortgagor as well, as in a case where, after a failure to pay a part of the debt when due, and by the terms of the mortgage the whole debt thereupon became due, a person purchasing the notes and mortgage subsequently took them after maturity, and therefore subject to the equities existing between the original parties.[2]

1184. Provisions against forfeiture. — Where it is stipulated as part of the mortgage contract, that "the loan shall not be called in so long as the mortgagor continues to punctually pay the interest semi-annually, and the value of the estate pledged shall be double the amount of the debt, until the expiration of two years after the service of a written notice stating the time when payment will be required," no foreclosure can be had until this provision is complied with and the notice given.[3] In like manner, if the mortgage contains the usual provision that the several notes secured by it, though maturing at different dates, shall not become due and the mortgage shall not be foreclosed till the maturity of the note made payable latest, no judgment can be recovered upon any of the notes until the last has matured. The notes and deed are to be read together as one instrument.[4]

1185. The court has no power to relieve a mortgagor from a forfeiture of condition that the whole principal shall become due at the election of the mortgagee upon a failure to pay the in-

[1] Mallory *v.* West Shore Hudson Riv. R. R. Co. 35 N. Y. Superior Ct. 174. In like manner a provision in a mortgage note that "upon a failure to pay any of said interest within thirty days after due, the holder may elect to consider the whole note due, and it may be collected at once," can be taken advantage of only by the holder of such note. Fletcher *v.* Daugherty, 13 Neb. 224.

[2] First Nat. Bank *v.* Peck, 8 Kans. 660. This case is questioned in Fletcher *v.* *v.* Daugherty, *supra.*

[3] See § 1178; Belmont Co. Branch Bank *v.* Price, 8 Ohio St. 299.

[4] Brownlee *v.* Arnold, 60 Mo. 70; and see Noell *v.* Gaines, 68 Mo. 649; *S. C.* 8 Cent. L. J. 353.

terest, or to order a stay of proceedings until a further default,[1] unless fraud or improper conduct on the plaintiff's part is proved; as in case he has prevented the mortgagor from ascertaining the owner of the mortgage, and making payment to him within the time fixed by the condition;[2] or the mortgagor has made an honest but unsuccessful effort to find the mortgagee and tender him the interest.[3] The mortgagor, having negligently permitted the time to pass, and the whole debt thereby to become due, cannot relieve the forfeiture by paying into court the interest or instalment on which the forfeiture occurred.[4] If the only questions be, whether a tender had been properly made at any time, and if so, whether made within the time prescribed by the condition, these must be determined upon the trial of the foreclosure action.[5] But the forfeiture will not be enforced against one who in good faith and upon reasonable grounds denies his liability to pay interest, or claims that he has paid it, even if it turns out, upon trial of the matter, that he was in error about it.[6]

1186. Waiver of default of credit. — When a mortgagee has made his election to regard the principal sum due under a stipulation that he shall have this election upon the non-payment of interest for thirty days after it becomes due, he cannot be compelled to waive this provision and accept the interest. Undoubtedly an unconditional acceptance of the interest in default would be a waiver of the default;[7] but the acceptance of an instalment of the principal already due would not be such a waiver;[8] nor would the commencement of a foreclosure suit prior to the expiration of the time after which the mortgagee may elect that the whole amount shall become due; he may after that time file an amended and supplemental complaint, and proceed for the collection of the whole amount.[9] An acceptance of an instalment by an agent of the mortgagee without his authority does not have the effect to restore the contract.[10]

A forfeiture is waived by a parol extension of the time of pay-

[1] Bennett *v.* Stevenson, 53 N. Y. 508; Buchanan *v.* Berkshire L. Ins. Co. 96 Ind. 510, 521.

[2] Noyes *v.* Clark, 7 Paige (N. Y.), 179.

[3] Hale *v.* Patton, 60 N. Y. 233; Lynch *v.* Cunningham, 6 Abb. (N. Y.) Pr. 94; Asendorf *v.* Meyer, 8 Daly (N. Y.), 278.

[4] Ferris *v.* Ferris, 28 Barb. (N. Y.) 29.

[5] Bennett *v.* Stevenson, 53 N. Y. 508.

[6] Wilcox *v.* Allen, 36 Mich. 160.

[7] Langridge *v.* Payne, 2 John. & H. 423; *In re* Taaffe, 14 Ir. Ch. R. 347; Lawson *v.* Barron, 18 Hun (N. Y.), 414; Moore *v.* Sargent (Ind.), 14 N. E. Rep. 466.

[8] Moore *v.* Sargent, *supra.*

[9] Malcolm *v.* Allen, 49 N. Y. 448.

[10] Sloat *v.* Bean, 47 Iowa, 60; *S. C.* 7 Reporter, 237.

ing the interest; and after a mortgagee has ratified such extension made by an agent, a subsequent similar extension made by the agent would be deemed a waiver by the mortgagee, and his suit at law to enforce the note or bond on the ground of such forfeiture would be enjoined.[1] If the mortgagor sets up as an excuse for failure to pay at the time specified a parol agreement with the mortgagee that the latter would give him twenty days' additional time, he should make tender of the interest in his answer, and should pay the amount into court; otherwise, even if the extension should be regarded as a waiver of forfeiture of the principal debt, the plaintiff would be entitled to a judgment of foreclosure for the amount of interest due and for costs.[2]

A payment of a sum of money by the mortgagor for an extension of the time of payment for a term of years does not prevent the mortgagee from taking advantage of a subsequent forfeiture within that term; although such payment must be credited upon the mortgage debt, it is not appropriated to the interest so as to prevent a forfeiture.[3]

A provision in a mortgage by a railroad company, that the trustees shall sell the mortgaged property upon the request of the holders of a certain amount of the bonds secured, does not prevent a suit upon a bond which has become due by default according to the terms of the mortgage and bond. The enforcement of the bond and of the mortgage may depend upon different circumstances.[4]

It is no excuse for the non-payment of the money that the mortgagee died eight days before the interest became due, and the debtor urged feelings of delicacy about intruding with affairs of business so soon afterwards, it appearing that he made no attempt to pay the money, and paid no attention to the matter until it was demanded of him some weeks afterwards. He should have made inquiry within a reasonable time whether there was any one authorized to receive the money.[5]

A forfeiture of credit is waived by accepting interest after the expiration of the time at which the holder of the mortgage, by its terms, is entitled to a forfeiture of the principal sum. His receipt acknowledging the payment of interest as of the day on which it

[1] Manning *v.* Tuthill, 30 N. J. Eq. 29.

[2] Asendorf *v.* Meyer, 8 Daly (N. Y.), 278.

[3] Church *v.* Maloy, 9 Hun (N. Y.), 148.

[4] Philadelphia & Balto. Cent. R. R. Co. *v.* Johnson, 54 Pa. St. 127.

[5] Mobray *v.* Leckie, 42 Md. 474.

fell due is inconsistent with any claim of forfeiture.[1] But under a provision in a mortgage that in case the interest be duly and punctually paid the principal may remain for two years, or any other definite period, if an instalment of interest becomes due and is not paid upon demand, and the mortgagee thereupon demands payment of principal and interest, the mortgagee does not by a subsequent acceptance of the interest waive his right to call in the principal.[2]

1187. When a guarantor, or surety, or indorser, is secured by a mortgage, he cannot foreclose until he has paid the obligation he became liable upon;[3] and a mortgage given to indemnify one against damages occasioned by the negligence of the mortgagor or other person cannot be foreclosed until judgment has been recovered for the negligence, because it is not certain before this that the mortgagee has been damnified.[4] Where a mortgage was given to secure the performance of a contract of the mortgagor to consign all the goods he should manufacture for three years to the mortgagee, who accepted drafts for the mortgagor's accommodation, and was obliged to pay them, it was held that upon the insolvency of the mortgagor the mortgagee was entitled to an immediate foreclosure, because the agreement contemplated a continuous performance of it, and the assignee could not carry on the business as stipulated.[5]

An indorser for accommodation who is secured for his liability by a mortgage need not wait till the note indorsed by him is protested before paying it, in order to have the benefit of his mortgage security; but upon being informed by the principal debtor that he could not and should not pay the note, such indorser may pay the note in time to save it from going to protest, and such payment will be within the condition of the mortgage.[6]

The condition of a mortgage given to indemnify a surety is

[1] Sire *v.* Wightman, 25 N. J. Eq. 102.

[2] Keene *v.* Biscoe, L. R. 8 Ch. D. 201; Langridge *v.* Payne, 2 John. & H. 423, distinguished, as the mortgagee's notice there might be regarded as conditional. See observation in *In re* Taaffe, 14 Ir. Ch. 347, that the latter case should be overruled.

[3] Ketchum *v.* Jauncey, 23 Conn. 123, 126; Kramer *v.* Farmers' & Mechanics' Bank, 15 Ohio, 253; McConnell *v.* Scott, Ib. 401; Ohio Life Ins. & Trust Co. *v.* Reeder, 18 Ohio, 35; Lewis *v.* Richey, 5 Ind. 152; Francis *v.* Porter, 7 Ind. 213.

[4] Grant *v.* Ludlow, 8 Ohio St. 1; Tilford *v.* James, 7 B. Mon. (Ky.) 336; Planters' Bank *v.* Douglass, 2 Head (Tenn.), 699.

[5] Harding *v.* Mill River Woollen Manuf. Co. 34 Conn. 458, 461.

[6] National State Bank *v.* Davis, 24 Ohio St. 190.

not broken until the surety has been obliged to pay the debt, and therefore his right to foreclose does not accrue until that time.[1] It is sufficient, however, if he has paid a part of the debt.[2] Neither is it necessary that the amount of the damages sustained by the mortgagee should be determined by a suit at law before filing a bill to foreclose.[3]

1188. When the condition is to pay or to save harmless, the mortgagee may foreclose on the mortgagor's failure to pay;[4] although when the condition is merely to save harmless he cannot foreclose until he has suffered loss. If the condition be to pay and save harmless, it is broken upon failure to pay.

A condition that the mortgagor "shall promptly pay and discharge all notes and papers of his upon which the mortgagees shall become indorsers or acceptors, together with all the interest, costs, and charges thereon, so as to save said mortgagees harmless by reason of their connection with such paper," is broken at once on a failure to pay at maturity, and the mortgagee may foreclose without further action. Although the power of sale in this mortgage was limited to the case of the mortgagee being damnified by paying the debts himself, the mortgage was foreclosed in equity. The power of sale need not be coextensive with the condition of the mortgage; and although that remedy cannot be used for a breach not covered by the power, the remedy in equity is open upon every breach of the condition.[5]

When a mortgage is given to secure the payment of the note of a third person, which the mortgagor transfers to the mortgagee at the time of executing the mortgage, the mortgagee may foreclose the mortgage upon the happening of a breach, without first prosecuting his remedy against the maker of the note.[6]

1189. A mortgagee may be estopped from foreclosing his mortgage by an agreement with the mortgagor, upon which the latter has acted, that the mortgage should never be enforced against him; and even without any positive agreement, if the

[1] Colvin *v.* Buckle, 8 M. & W. 680; Rodman *v.* Hedden, 10 Wend. (N. Y.) 499, 500; Platt *v.* Smith, 14 Johns. (N. Y.) 368; Powell *v.* Smith, 8 Ib. 249; M'Lean *v.* Ragsdale, 31 Miss. 701; Shepard *v.* Shepard, 6 Conn. 37; Pond *v.* Clarke, 14 Conn. 334.

[2] Beckwith *v.* Windsor Manuf. Co. 14 Conn. 594.

[3] Rodgers *v.* Jones, 1 McCord (S. C.), Ch. 221.

[4] Thurston *v.* Prentiss, 1 Mich. 193; Dye *v.* Mann, 10 Mich. 291; Butler *v.* Ladue, 12 Mich. 173; Francis *v.* Porter, 7 Ind. 213; Ellis *v.* Martin, 7 Ind. 652; Lewis *v.* Richey, 5 Ind. 152.

[5] Butler *v.* Ladue, *supra.*

[6] Ballenger *v.* Oswalt, 26 Ind. 182; O'Haver *v.* Shidler, Ib. 278.

mortgagee, by giving the mortgagor to understand that he should be released of the burden of the mortgage, intentionally leads the mortgagor to act in such a manner that he will be seriously prejudiced by the mortgagee's not carrying out the understanding.[1]

A person being desirous of purchasing land upon which there was a mortgage, but being unable to make the payments at the times specified in the mortgage, called upon the holder of it, who agreed verbally that if the proposed purchaser would pay two hundred dollars the ensuing spring, and interest on all sums remaining unpaid annually thereafter, and would make certain improvements, he would extend the time of payment of the mortgage for twenty years. The purchase was accordingly made and all the requirements complied with, except that the purchaser failed for two years to pay the interest. It was decided that the time of payment was extended by the verbal contract, and that there was no default in the payment of the principal, although there might have been a foreclosure for the interest remaining unpaid.[2]

1190. If the time of payment of a mortgage be extended, the right to foreclose is of course suspended until the expiration of the extended term. The extension of the time of payment, if binding, has the effect in equity of modifying the original condition of the mortgage, to the same extent as if the terms of the new agreement were incorporated into the condition.[3] A verbal agreement to extend the time of payment is binding, and suspends the right to foreclose if founded on a good consideration and otherwise valid;[4] but if made without consideration it amounts to nothing, and the mortgage may be foreclosed at any time.[5] The

[1] Faxton *v.* Faxon, 28 Mich. 159. In this case the mortgagee having persuaded a son of the mortgagor, after the death of the latter, to remain upon the farm, and support his father's family, upon a promise that the mortgage should not be enforced against the family, was not allowed, after the son had cultivated the farm and supported the family for several years, to foreclose the mortgage. See Fausel *v.* Schabel, 22 N. J. Eq. 126, for circumstances and agreement not amounting to an agreement to extend; Burke *v.* Grant. 116 Ill. 124.

[2] Burt *v.* Saxton, 1 Hun (N. Y.), 551.

[3] Union Cent. L. Ins. Co. *v.* Bonnell, 35 Ohio St. 365.

It is suggested that such an extension takes the mortgage out of the statute as between the original parties only, and not between the mortgagee and innocent purchasers who had no notice of the extension. Wyman *v.* Russell, 4 Biss. 307.

[4] Tompkins *v.* Tompkins, 21 N. J. Eq. 338; Trayser *v.* Indiana Asbury University, 39 Ind. 556; Loomis *v.* Donovan, 17 Ind. 198; Redman *v.* Deputy, 26 Ind. 338; Fish *v.* Hayward, 28 Hun (N. Y.), 456.

[5] Massaker *v.* Mackerley, 9 N. J. Eq. (1 Stockt.) 440.

payment of interest in advance is a sufficient consideration to support an extension of a mortgage.[1]

Where the mortgage was payable in six months after date, with interest monthly in advance, and contained also a stipulation that in case the interest or any portion of it should become due and remain unpaid after demand, then the mortgage should be foreclosed, the prompt payment of the interest was held not to prolong the time of payment beyond the six months, and a cause of action upon the note and mortgage then accrued.[2]

An agreement to extend the payment of a debt already due is not to be implied from a provision in a mortgage of a mining claim, that the debt is to be paid as fast as it can be made out of the claim, after deducting certain expenses; nor does such an agreement imply that the claim is to be paid only in this way.[3]

When a mortgagee in assigning an overdue mortgage guarantees its payment and provides for its extension upon condition of the prompt payment of the interest, this agreement does not enure to the benefit of the mortgagor; but the mortgagee may at any time after a default require the assignee to proceed to foreclose at his expense.[4]

Only a party to an agreement to extend the time of payment can maintain an action for a breach of it by the mortgagee.[5]

1191. If the time of payment of such a mortgage be extended by a parol agreement, though this may be insufficient to change the legal effect and operation of the writing under seal, it will be a sufficient waiver of the default contemplated in the mortgage, and neither a court of equity nor a court of law will enforce a forfeiture of credit which has occurred under such agreement.[6] A foreclosure suit brought before the expiration of the time so extended is premature, and will be dismissed.[7]

[1] Maher *v.* Laufrom, 86 Ill. 513; *In re* Betts, 4 Dill. 93; *S. C.* 7 Reporter, 225.

[2] Pendleton *v.* Rowe, 34 Cal. 149.

[3] Sharpe *v.* Arnott, 51 Cal. 188.

[4] Lee *v.* West Jersey Land & Cranberry Co. 29 N. J. Eq. 377.

[5] Reed *v.* Home Savings Bank, 127 Mass. 295.

[6] Albert *v.* Grosvenor Investment Company, L. R. 3 Q. B. 123, 127. Mr. Chief Justice Cockburn said: "This is the case of a mortgage whereby the mortgagor transfers the property in certain goods to the mortgagees, but subject to the mortgagor's right of redemption; and there are certain clauses in the deed, the result of which is, that the mortgagees cannot seize and sell the goods unless the mortgagor makes default in paying the instalments of £2, which he is bound to do on each successive Monday until the loan is repaid. Now the facts are, that the plaintiff's wife went to Bayne (who must be taken to have had full authority to bind

[7] Goodall *v.* Boardman, 53 Vt. 92.

the defendants by what he did, for, on the evidence, I see not the slightest reason to believe any one else ever interfered in the management of the business of the company) and told him that her husband had difficulty in meeting the instalment due on the 28th of August, and Bayne extended the time for the payment of that and the next instalment to the 11th of September. Now the bill of sale provides that if the mortgagor shall make 'default' in payment of the sum of £62 10*s.*, or any part thereof, the whole amount shall be then immediately due and payable; and it shall be lawful for the mortgagees to take possession of the goods, and to sell and dispose of them. Now 'default' must be taken to mean a non-payment by the party bound to pay, without the consent of the parties having a right to waive the payment. And I see nothing which goes to show that if, by the consent of the person who is to receive payment, the time for payment is extended, the omission to pay within the time specified must be a 'default' within the meaning of the word in the bill of sale; and it would be monstrous to hold that it was a default, for the mortgagee might always lead the mortgagor into a snare by consenting that the time for payment should be extended, and then coming down upon him by insisting that there had been a default. And even if money were offered by the mortgagor the next day, and it were accepted by the mortgagee, the result would be the same. 'Default' must mean a default where something is not done by the mere act of omission of the one party, and not an omission with the concurrence of the other party. And in the present case the voluntary extension of the time by Bayne alters the character of the act of the plaintiff, which would otherwise have been a default."

CHAPTER XXVI.

WHEN THE RIGHT TO FORECLOSE IS BARRED, 1192–1214.

1192. Statutes of limitation are, as a general rule, only applicable as such to proceedings at law; but without having any binding force upon courts of equity they have been adopted here by analogy as fixing the time within which rights may be enforced in equity.[1] Following this analogy, the right of the mortgagee to foreclose and of the mortgagor to redeem is presumed to be barred after the lapse of such a period as is prescribed by the statute for enforcing a right of entry upon lands. This period, by the English Statute of Limitation of 32 Henry 8, and 21 James 1, and by the earlier statutes enacted in this country, which generally followed the English statute, was twenty years;[2] and following the analogy of these statutes so long as they remained in force, the lapse of this period was in the same way presumed, as between a mortgagor and mortgagee, to be a bar to the rights of the one as against the other. In the early case of *White* v. *Ewer*,[3] "the Lord Keeper declared that he would not relieve mortgages after twenty years; for that the statute of 21 Jac. 1, ch. 16, did adjudge it reasonable to limit the time of one's entry to that number of years; unless there are such particular circumstances as may vary the ordinary case, as infants, *femes covert*,

[1] Ayres *v.* Waite, 10 Cush. (Mass.) 72; Morgan *v.* Morgan, 10 Ga. 297; Roberts *v.* Welch, 8 Ired. (N. C.) Eq. 287; Ray *v.* Pearce, 84 N. C. 485; Coyle *v.* Wilkins, 57 Ala. 108; Cleveland Ins. Co. *v.* Reed, 1 Biss. 180; Wyman *v.* Russell, 4 Biss. 307. *Per contra*, Lord Redesdale, in Cholmondeley *v.* Clinton, 4 Bligh, 119, said the statute was meant to bind courts of equity. Pitzer *v.* Burns, 7 W. Va. 63, 69.

[2] The words of the statute 21 James 1, ch. 16, § 1, are, that "for quieting men's estate, be it enacted, that no person or persons shall, at any time hereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and in default thereof, such persons so entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary notwithstanding." In case of disabilities entry may be made within ten years after the removal of the same.

[3] 2 Vent. 340.

etc., are provided for in the very statute; though those matters in equity are to be governed by the course of the court, and that it is best to square the rules of equity as near the rules of law and reason as may be."

It is the general rule, therefore, that no interest having been paid, and no entry made under the mortgage or other proceedings had to enforce the mortgage, it is presumed as a matter of fact from these circumstances that the mortgage has been discharged by payment or otherwise. This presumption of fact is, however, always liable to be controlled by other evidence. The period of twenty years is not adopted as a fixed and positive limitation of right, but as an equitable rule, after the analogy of the statute of limitations.[1] In several states in which the time of limitation has been made less than twenty years, the analogy of the statute of limitations is followed, and a corresponding period is adopted in equity as a bar to a suit to foreclose or redeem a mortgage.[2]

The rule is otherwise in Alabama;[3] for while it is held that

[1] In **Iowa** the statute of limitations is held to apply directly to suits in equity as well as suits at law, and to bar a suit to foreclose a mortgage after the lapse of ten years. Newman *v.* De Lorimer, 19 Iowa, 244; Hendershott *v.* Ping, 24 Iowa, 134. The right to foreclose a title bond is barred in the same time. Day *v.* Baldwin, 34 Iowa, 380.

[2] As in **Vermont**: Richmond *v.* Aiken, 25 Vt. 324; Martin *v.* Bowker, 19 Vt. 526; Merriam *v.* Barton, 14 Vt. 501. **Connecticut**: Haskell *v.* Bailey, 22 Conn. 569; Crittendon *v.* Brainard, 2 Root, 485. **Kentucky**: Field *v.* Wilson, 6 B. Mon. 447. **Iowa**: Crawford *v.* Taylor, 42 Iowa, 260.

[3] Byrd *v.* McDaniel, 33 Ala. 18; Coyle *v.* Wilkins, 57 Ala. 108. In the latter case Brickell, C. J., upon this distinction further said: "After forfeiture the mortgagee has the complete legal title. It is in equity only, and by construction, that he is regarded as a trustee of the legal estate for the mortgagor and bound to apply the rents and profits to the payment of the mortgage debt. A possession without recognition of the equity of the mortgagor, without an application of the rents and profits, as by decree of a court of equity their application could be compelled, is in hostility to and adverse to the mortgagor, and referable only to the legal title.

"The mortgagor stands in a different relation. If in possession, his possession is permissive, referable, and in subordination to the legal title of the mortgagee, until, by disclaimer, of which the mortgagee has notice, it becomes adverse. His alienation passes only his equity of redemption, and if the alienee has notice of the mortgage he enters and holds in subordination to the title of the mortgagee.

"The mortgage to the appellant was properly recorded, and it is not necessary, therefore, to examine the evidence which has been offered to show actual notice to those entering subsequently into possession of the premises under the mortgagor. The registration is equivalent to actual notice, and the purpose of the statutes which authorize it is to make it operate as direct notice to all persons deriving title from the mortgagor. Having notice, they are bound by the mortgage; and the evidence fails to show any disclaimer by them of the title of the mortgage."

the possession of the mortgagee after the law day of the mortgage without an account of rents and profits, or other recognition of the mortgagor's equity of redemption for the period which, under the statute of limitations, would bar an action at law, if the right and remedy were legal, would by analogy bar the mortgagor of a bill to redeem, it is held that a mortgagee is not barred of a bill to foreclose, unless twenty years have elapsed without the payment of interest or an admission of the existence of the mortgage debt creating the presumption of its payment. The distinction taken between a bill by the mortgagor to redeem and a bill by the mortgagee for foreclosure rests on the difference of the right, and of the possession of the mortgagee and of the mortgagor. The statute does not begin to run until there is a breach of the condition of the mortgage.[1]

1193. The tendency of legislation has been to reduce the period of limitation within which suits relating to real property shall be brought.[2] A statement is appended of the periods of limitation in the several states applicable to actions for the recovery of real property, though it will be observed that in some states there are special provisions applicable to mortgages.[3] A

[1] Delano *v.* Smith, 142 Mass. 490.

[2] "It might at first sight be considered that the duration of wrong ought not to give it a sanction, and that the long suffering of injury should be no bar to the obtaining of right when demanded. But human affairs must be conducted on other principles. It is found to be of the greatest importance to promote peace by affixing a period to the right of disturbing possession. Experience teaches us that, owing to the perishable nature of all evidence, the truth cannot be ascertained on any contested question of fact after a considerable lapse of time. The temptation to introduce false evidence grows with the difficulty of detecting it; and at last, long possession affords the proof most likely to be relied upon of the right of property. Independently of the question of right, the disturbance of property after long enjoyment is mischievous. It is accordingly found both reasonable and useful that enjoyment for a certain period of time against all claimants should be considered conclusive evidence of title." First Report of the Real Property Commissioners of England, 1829, p. 39.

[3] **Alabama**: Ten years. R. C. 1876, § 3225. **Arkansas**: Five years. Dig. of Stat. 1874, § 4118. **California**: An action upon any contract, obligation, or liability, founded upon an instrument in writing executed in this state, must be brought within four years. This is held to apply to mortgages, which are not regarded as conveyances of land. Code of Civil Procedure, § 337; Amendments 1874, p. 291. See § **1207**. **Colorado**: Six years. R. S. 1868, p. 438. **Connecticut**: Fifteen years. G. S. 1875, p. 493. **Dakota Territory**: Twenty years. R. C. 1877, p. 515. **Delaware**: Twenty years. R. C. 1874, p. 727. **Florida**: Seven years. Laws 1872, p. 20. Foreclosure suit barred in twenty years. Jordan *v.* Sayre, 3 So. Rep. 329. **Georgia**: Twenty years; or seven years under written evidence of title. Code 1873, §§ 2682, 2683. And see Parker *v.* Jones, 57 Ga. 204. **Idaho Territory**: Five years. R. L. 1875, p. 588. **Illinois**: An action or sale to foreclose any mortgage, or deed of trust in

reference to the earlier statutes in several states will show that the period has been materially shortened in the present statutes.

the nature of a mortgage, is limited to ten years after the right of action or right to make such sale accrues. Real actions are limited to twenty years. R. S. 1877 and 1880, ch. 83, §§ 1, 11. **Indiana**: Twenty years. R. S. 1888, § 293; Catterlin *v.* Armstrong, 101 Ind. 258. **Iowa**: Ten years. Code 1873, p. 432. See § **1207**. **Kansas**: Fifteen years. G. S. 1868, ch. 80, § 16; Dassler's Stats. of Kans. 1876, p. 644. See § **1207**. **Kentucky**: Fifteen years. G. S. 1873, ch. 71, § 1. **Maine**: Twenty years. R. S. 1871, ch. 105, § 1. **Massachusetts**: Twenty years. G. S. 1860, ch. 154, § 1. **Michigan**: Fifteen years. C. L. 1871, § 7137; Acts of 1879, p. 186. **Maryland**: Twenty years by analogy to the time of limitation under the statute of James. Baltimore & Ohio R. R. Co. *v.* Trimble, 51 Md. 99. **Minnesota**: An action to foreclose a mortgage upon real estate must be commenced within ten years after the cause of action accrues. Laws 1870, ch. 60. This act did not apply to power of sale mortgages. Golcher *v.* Brisbin, 20 Minn. 453. By Laws 1871, ch. 52, mortgages containing powers of sale must be foreclosed within the same time. By Laws 1879, ch. 21, such mortgages may be foreclosed within fifteen years after maturity. See, also, Archamban *v.* Green, 21 Minn. 520; Parsons *v.* Noggle, 23 Minn. 328; Reeves *v.* Vinacke, 1 McCrary, 213; Duncan *v.* Cobb, 32 Minn. 460. **Mississippi**: No action or other proceeding can be had upon a mortgage or deed to recover the money secured, except within the time that may be allowed for the commencement of an action at law upon such writing; and in all cases where the remedy at law to recover the debt is barred, the remedy in equity on the mortgage is barred. Actions on contracts not under seal are limited to six years; and actions on open account to three years. R. C. 1871, §§ 2150, 2151. An equitable mortgage by absolute conveyance is subject to same rule when mortgagor remains in possession. Green *v.* Mizelle, 54 Miss. 220; R. C. 1880, §§ 2667–2670. See § **1207**. **Missouri**: Ten years. 2 Wagner's Stats. 1870, p. 915; 1 R. S. 1879, § 3219. **Montana Territory**: Three years. Laws 1872, p. 516. **Nebraska**: Actions to foreclose mortgages must be commenced within ten years after the cause of action accrues. G. S. 1873, p. 525; Compiled Stats. 1881, p. 531; Studebaker Manuf. Co. *v.* McCargur, 20 Neb. 500. See § **1207**. **Nevada**: Four years, as in California. C. L. 1873, §§ 1020, 1031; Henry *v.* Confidence G. & S. Mining Co. 1 Nev. 619. See § **1207**. **New Hampshire**: Actions for the recovery of real estate are limited to twenty years. Actions upon notes secured by mortgage may be brought so long as the plaintiff is entitled to bring an action upon the mortgage. G. S. 1867, ch. 202, §§ 1, 5; G. L. 1878, ch. 221, §§ 1, 5. **New Jersey**: Twenty years. Nixon's Dig. 1868, p. 512; Rev. 1877, p. 597. **New York**: Twenty years. Code of Civil Procedure 1876, §§ 365, 379. **North Carolina**: Action must be commenced within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on it. Battle's Rev. 1873, p. 149; Fraser *v.* Bean, 2 S. E. Rep. 159. **Oregon**: Actions for the recovery of real property, and suits in equity to determine any right or claim to real property, may be brought within twenty years; an action upon a sealed instrument, within ten years. G. L. 1872, p. 106. A foreclosure suit is not regarded as a suit upon a real estate interest, and therefore is barred in ten years as a suit upon a sealed instrument. Eubanks *v.* Leveridge, 4 Sawyer, 274. **Pennsylvania**: Twenty-one years. Brightly's Purdon's Dig. vol. 2, p. 927. **Rhode Island**: Twenty years. G. S. 1872, ch. 194, § 4. **South Carolina**: Twenty years. R. S. 1873, p. 588. **Tennessee**: Seven years. Code 1871, §§ 2763–2765. **Texas**: Ten years. Paschal's Dig. 1873, p. 765. **Vermont**: Fifteen years. G. S. 1862, p. 442, § 1. See § **1207**. **Virginia**: No deed of trust, mortgage, or lien

But the history of the law of limitations in England illustrates this fact most forcibly. At common law there was no period of limitation within which any action now in use should be brought. An uncertain doctrine of presumption was applied against stale demands and claims.

Previous to the reign of Henry VII. there was no statute prescribing a period of a certain number of years within which the assertion of a claim to real estate was limited; though different events had been selected by successive enactments, from the Anglo-Norman times down to the time of Henry VII., as periods of limitation beyond which claimants should not go for the foundation of titles as against persons who had been in possession since the specified time. The lapse of time rendered fresh starting points necessary to the security of titles. The beginning of the reign of Henry I., of Richard I., the last return of King John out of Ireland into England, the coronation of King Henry III., and the first voyage of King Henry III. into Gascony, were periods of limitation successively selected.[1]

"A profitable and necessary statute," passed near the close of the reign of Henry VIII.,[2] for the first time provided a fixed period of limitation within which actions should be brought. The general period for actions for the recovery of real estate was threescore years. By the statute of James I. this period was reduced to twenty years. By the recent act, which went into operation on the first day of January, 1879, the period is reduced to twelve years.[3]

for purchase money shall be enforced after twenty years from the time when the right to enforce the same first accrued; but this does not apply to any deed of trust or mortgage executed by a corporation. Code 1887, § 2935. **West Virginia**: Ten years. Code 1887, ch. 104, § 1. **Wisconsin**: Twenty years. R. S. 1878, ch. 177, § 4209. The twenty years' limitation applies to suits for the foreclosure of mortgages on the ground that they are instruments under seal. Whipple *v.* Barnes, 21 Wis. 327. A suit to redeem, however, must be brought within ten years, as this is an equitable action coming within a clause of the statute limiting actions not otherwise specified for. Knowlton *v.* Walker, 13 Wis. 264. R. S. 1878, § 4227. **Wyoming Territory**: Twenty-one years. C. L. 1876, p. 34.

[1] See Stat. of Merton (20 Hen. 3), ch. 8; Stat. of West. 1 (3 Edw. 1), ch. 39. See Edson *v.* Munsell, 10 Allen (Mass.), 557, for a sketch of the history of the English Statute of Limitations and of that of Massachusetts. And see Fellowes *v.* Clay, 4 Q. B. 313, 354, per Lord Denman, C. J.

[2] Co. Litt. § 115 *a*; 32 Hen. 8, ch. 2.

[3] By the Real Property Limitation Act, 1874, which went into operation on the first day of January, 1879, "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, in law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall

1194. In some early cases it was declared that the presumption of payment arising from the lapse of time, though applicable to a bond secured by the mortgage, was not applicable to the mortgage itself, inasmuch as the legal estate was in the mortgagee, and the mortgagor was regarded as a mere tenant at will, whose possession was therefore the possession of the mortgagee.[1] This doctrine was, however, repudiated by Lord Thurlow in 1791,[2] and it has not in any case since been asserted. The fact

have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given." 37 & 38 Vict. ch. 57, § 8.

[1] Toplis *v.* Baker, 2 Cox, 118; Leman *v.* Newnham, 1 Ves. Sen. 51; *dictum* in Cholmondeley *v.* Clinton, 2 Meriv. 171, 360.

[2] Trash *v.* White, 3 Bro. Ch. 289. The Lord Chancellor said: "That if the case was clear that no interest had been paid for twenty years, he had always understood that it did raise the presumption that the principal had been paid; but there must not only be non-payment of interest, but no demand; and, in that case, he thought the presumption on a mortgage as strong as that at law." In Christophers *v.* Sparke, 2 Jac. & W. 223, though the decision turned upon another point, Sir Thomas Plumer, Master of the Rolls, said, in relation to this question of presumption: "I cannot accede to the doctrine that no length of time will operate against a mortgagee who has been out of possession without claim or acknowledgment. The argument of there being a tenancy at will arises from a mere fiction; for there is no actual tenancy, no demise, either express or implied. A mortgagor has not even the rights of a tenant at will; he may be turned out of possession without notice, and is not entitled to the emblements. It is only *quodam modo* a tenancy at will, as Lord Mansfield says in one of the cases. Moss *v.* Gallimore, 1 Doug. 279. We cannot push it to that extent, reasoning on the supposed relation of landlord and tenant, which is not founded in fact. The relation of mortgagor and mortgagee is peculiar: in a court of equity the former is considered as owner; and that is the nature of the contract between them; the tacit agreement is, that he is to be the owner if he pays. Then what is to be the effect of one person's continuing for twenty years in possession of the estate of another, who does nothing to make good his title, and to keep alive the relation of mortgagor and mortgagee? The difficulty I feel is, that if twenty years' possession, without claim on the part of the mortgagee, will not operate as a defence against him, I do not see how any period of time, however long, can bar him. If the fiction of a tenancy at will is an answer to the objection after twenty years, why will it not be an answer after any other time? There would be no possibility of stopping. With respect to the mortgagor, it is clear that his equity is shut out by the mortgagee being in possession for twenty years without acknowledgment; then why should this not be reciprocal? Why should it be necessary for the relation to be kept alive in the one case, and not in the other? For these reasons, though I do not give a positive opinion, I cannot agree to the doctrine intimated in the cases alluded to."

that the debt is secured by a mortgage does not place it on any different footing from a debt due upon a bond without a mortgage, but is liable to be defeated by the same presumption arising from lapse of time and laches of the mortgagee.

Although the mortgagor is not a tenant at will to the mortgagee in any such sense that his possession cannot become adverse, yet the resemblance holds to this extent, that so long as the mortgagor acknowledges his relation to the mortgagee by payment of interest or the like, his possession is the possession of the mortgagee.[1] The mortgagor may convey, mortgage, or lease the premises, or deal with them in other ways as the owner of them, without rendering his possession hostile to the mortgagee. The constructive possession of the mortgagee continues until the mortgagor's holding is either in opposition to the will of the mortgagee or is without any recognition of his right.[2]

1195. This doctrine of presumption has been one of frequent application against the mortgage debt, and is fully established everywhere.[3] It arises from the policy of the law. It does not proceed necessarily on a belief that payment has actually taken place.[4] The lapse of time and the neglect of the mortgagee

[1] In Harris *v.* Mills, 28 Ill. 44, Mr. Justice Walker says: "It has been said that no length of time will bar a foreclosure by a mortgagee out of possession. This is placed upon the ground that the relation of landlord and tenant is supposed to exist between the parties. But such is not the true relation of the parties. For some purposes, and to a limited extent only, a portion of the incidents are the same. To a limited extent, and for some purposes, the relation of vendor and vendee, and trustee and *cestui que trust,* also exists."

[2] Jones *v.* Williams, 5 Ad. & E. 291; *S. C.* 6 Nev. & M. 816; Hall *v.* Surtees, 5 B. & Ald. 686, 687; Higginson *v.* Mein, 4 Cranch, 415; Howland *v.* Shurtleff, 2 Met. (Mass.) 26; Inches *v.* Leonard, 12 Mass. 379; Sheafe *v.* Gerry, 18 N. H. 245; Howard *v.* Hildreth, 18 N. H. 105; Roberts *v.* Littlefield, 48 Me. 61; Chick *v.* Rollins, 44 Me. 104; Bates *v.* Conrow, 11 N. J. Eq. (3 Stockt.) 137; Atkinson *v.* Patterson, 46 Vt. 750; Martin *v.* Jackson, 27 Pa. St. 504; Benson *v.* Stewart, 30 Miss. 49; Boyd *v.* Beck, 29 Ala. 703; Drayton *v.* Marshall, Rice (S. C.) Eq. 373; Pitzer *v.* Burns, 7 W. Va. 63.

[3] Howland *v.* Shurtleff, *supra;* Inches *v.* Leonard, *supra;* Bacon *v.* McIntire, 8 Met. (Mass.) 87; Hughes *v.* Edwards, 9 Wheat. 498; Collins *v.* Torry, 7 Johns. (N. Y.) 278; Jackson *v.* Wood, 12 Ib. 242; Jackson *v.* Pratt, 10 Ib. 381; Giles *v.* Baremore, 5 Johns. (N. Y.) Ch. 545, 552; Newcomb *v.* St. Peter's Church, 2 Sandf. (N. Y.) Ch. 636; Martin *v.* Bowker, 19 Vt. 526; Field *v.* Wilson, 6 B. Mon. (Ky.) 479; McNair *v.* Lot, 34 Mo. 285; Wilson *v.* Albert, 89 Mo. 537; Nevitt *v.* Bacon, 32 Miss. 212; Wilkinson *v.* Flowers, 37 Miss. 579; McDonald *v.* Sims, 3 Kelly (Ga.), 383; Hoffman *v.* Harrington, 33 Mich. 392; Reynolds *v.* Green, 10 Mich. 355; Goodwyn *v.* Baldwin, 59 Ala. 127; Blaisdell *v.* Smith, 3 Bradw. (Ill.) 150; Agnew *v.* Renwick (S. C.), 4 S. E. Rep. 223.

[4] Hillary *v.* Waller, 12 Ves. 239, 252, per Sir William Grant.

to enforce his demand against the mortgagor, when he continues in adverse possession without recognizing the debt in any way, are grounds for a presumption in fact, which, unexplained, authorizes a jury to infer that the mortgage is satisfied, and is a sufficient answer to a bill by the mortgagee to foreclose. A bill to foreclose does not lie after the mortgagor has held adverse possession for a period equal to the statute period of limitations for real actions.[1] But the fact that there has been no recognition of the mortgage debt for a period less than the statute period of limitation, as, for instance, nineteen years, affords no presumption of payment.[2]

If the mortgagor remains in possession for twenty years without paying interest or rent, or otherwise admitting that the mortgage debt is unpaid, this is good presumptive proof of payment, and a defence to an action for foreclosure.[3] This rule applies equally to estates held in trust; the equitable rule, that the statute of limitations does not bar a trust estate, holds only as between *cestui que trust* and trustee, and not between a *cestui que trust* and trustee on the one side and a stranger on the other.[4] Neither does it matter that the *cestui que trust* is under disability, if there be a trustee to represent him.[5]

When there has been a foreclosure sale, whether defective or not, and this has not been followed by a conveyance to the purchaser or any recognition of the mortgage by the mortgage debtor, it will be presumed after the lapse of twenty years that the land has been redeemed from such sale.[6]

The mortgagor may avail himself of the benefit of this presumption of payment not only in defence to a foreclosure suit, but in a bill for reconveyance of the property, which he is constrained to bring for his protection against a judgment creditor of the mortgagee, who, with full knowledge of the fact that the deed to the latter is merely a mortgage, is about to proceed to sell the mortgaged premises as the property of the mortgagee.[7]

[1] Cleveland Ins. Co. *v.* Reed, 24 How. 284; Downs *v.* Sooy, 28 N. J. Eq. 55.

[2] Boon *v.* Pierpont, 28 N. J. Eq. 7.

[3] Bacon *v.* McIntire, 8 Met. (Mass.) 87; Chick *v.* Rollins, 44 Me. 104; Crook *v.* Glenn, 30 Md. 55; Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129, 135; Jackson *v.* Wood, 12 Johns. (N. Y.) 242; Jackson *v.* Pratt, 10 Ib. 381; Collins *v.* Torry, 7 Ib. 278; Jackson *v.* Hudson, 3 Ib. 375.

[4] Lord Hardwicke, in Llewellin *v.* Mackworth, 15 Vin. Abr. 125. pl. 1; Bond *v.* Hopkins, 1 Sch. & Lef. 429.

[5] Crook *v.* Glenn, *supra;* Wych *v.* East India Co. 3 P. Wms. 309.

[6] Reynolds *v.* Dishon, 3 Bradw. (Ill.) 173; Barnard *v.* Onderdonk, 98 N. Y. 158.

[7] Downs *v.* Sooy, *supra.*

1196. The presumption of payment is not conclusive in favor of a mortgagor who has been in uninterrupted possession for twenty years, but may be controlled by evidence of part payment of principal or interest, or other admissions or circumstances from which it may be found that the debt is still unpaid;[1] but parol evidence to control this presumption should clearly show some positive act of unequivocal recognition of the debt within that time.[2] Mere silent acquiescence in the mortgagee's demands of payment, without a well defined verbal promise to pay on the part of the mortgagor, or admission on his part of the debt, is not sufficient to repel the presumption.[3]

A new promise or acknowledgment will take the mortgage out of the statute of limitations;[4] as, for instance, where a note and mortgage were presented for payment or renewal to the makers, who wrote and signed at the foot of the mortgage a promise under seal to renew the note, and to give a new mortgage, whenever the exact amount of the debt should be ascertained, a plea of the statute of limitations to a bill to foreclose the mortgage was disallowed.[5] Such a promise or acknowledgment is binding not only upon the mortgagor who makes it, but upon a subsequent mortgagee, if the prior mortgage was duly recorded, for in such case the subsequent mortgagee having constructive notice from such record is put upon inquiry to ascertain whether such mortgage still remains in force.[6]

The new promise to avail anything must be an express promise, and not merely one raised by a doubtful implication of law, containing no direct admission of the debt as a subsisting obligation. Thus a recital in a deed by a mortgagor of the mortgaged property that the grantee assumes the payment of the mortgage does not conclusively establish a new promise on the part of the mortgagor to pay the mortgage debt, so as to take the mortgage debt out of the statute as against him.[7]

An extension[8] of a mortgage which covers a homestead not

[1] Locke *v.* Caldwell, 91 Ill. 417; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. (Sax.) 685; Barned *v.* Barned, 21 N. J. Eq. 245; Coldcleugh *v.* Johnson, 34 Ark. 312; Cook *v.* Parham, 63 Ala. 456; Philbrook *v.* Clark, 77 Me. 176.

[2] Jarvis *v.* Albro, 67 Me. 310; Ray *v.* Pearce, 84 N. C. 485.

[3] Cheever *v.* Perley, 11 Allen (Mass.), 584.

[4] Murphy *v.* Coates, 33 N. J. Eq. 424.

[5] Hart *v.* Boyt, 54 Miss. 547.

[6] Murphy *v.* Coates, 33 N. J. Eq. 424.

[7] Biddel *v.* Britzzolara, 56 Cal. 374.

[8] See § 1190.

executed by the wife of the mortgagor does not have the effect to keep the mortgage on foot as against the homestead right.[1]

1197. Presumption of payment is repelled by circumstances which evince an improbability of any discharge,[2] as well as by an express acknowledgment of the debt, or by acts recognizing it. Thus, this presumption has been considered as answered by showing that the mortgage debt belonged to the mother of the owner of the estate mortgaged, and that she had not permitted the title deeds to be delivered to him.[3]

The fact that the mortgagor is the son, brother, or other near relation of the mortgagee, and proof that he intentionally permitted the mortgagor to occupy the land without payment of interest, though for more than twenty years, are sufficient to rebut the presumption of payment.[4]

But the fact that the mortgage and bond secured thereby remain in the possession of the mortgagee does not repel the inference of payment which arises from lapse of time.[5]

It has even been held, in a case where it was shown that the parties to a bond resided in a country which was occupied by contending armies, and was in such a disturbed condition as to render it highly improbable that debts could or would be collected, the time during which the war continued should not be computed as forming any part of the time whose lapse gives rise to a presumption of payment.[6] But ordinarily the absence of the mortgagor from the state when the cause of action accrues or afterwards does not suspend or prevent the statute of limitations from running against a suit to foreclose the same, for the reason that the remedy may be as well pursued during his absence as in his presence.[7]

1198. A payment of interest or part of the principal renews the mortgage, so that an action may be brought to enforce it within twenty years after such last payment. This is a rule universally recognized.[8] Where there are several persons interested in the equity of redemption, such payment by one of them

[1] Wells *v.* Harter, 56 Cal. 342; *S. C.* 7 Reporter, 266.

[2] Brobst *v.* Brock, 10 Wallace, 519; Snavely *v.* Pickle, 29 Gratt. (Va.) 27; Lewis *v.* Schwenn (Mo.), 2 S. W. Rep. 391.

[3] Leman *v.* Newnham, 1 Ves. Sen. 51.

[4] Philbrook *v.* Clark, 77 Me. 176.

[5] Ray *v.* Pearce, 84 N. C. 485.

[6] Hale *v.* Pack, 10 W. Va. 145.

[7] Eubanks *v.* Leveridge, 4 Sawyer, 274; Anderson *v.* Baxter, 4 Oreg. 105, 107.

[8] Lewis *v.* Schwenn, *supra;* Schifferstein *v.* Allison (Ill.), 15 N. E. Rep. 275; Hollister *v.* York (Vt.), 9 Atl. Rep. 2.

keeps alive the right of entry not only against him, but also against all other owners of the equity.[1] Payment by an agent of the mortgagor, as, for instance, by his solicitor, has, of course, the same effect as a payment by the mortgagor himself;[2] but payment by a stranger does not affect the mortgagor's rights.[3] Acknowledgment of the debt made to a stranger does not avoid the running of the statute of limitations.[4] Payments of interest by a tenant for life are binding upon those entitled to the remainder;[5] and payments by the widow of the mortgagor, while in possession under her right of dower, prevent the statute running against the mortgagee in favor of the heirs at law.[6]

But a payment made by a mortgagor after he has sold or mortgaged the premises to another will not repel the presumption of payment arising after the lapse of twenty years from the time when the mortgage became due, so far as the subsequent purchaser or mortgagee is concerned.[7] Neither does a lease from a mortgagee[8] to his mortgagor, more than twenty years after the maturity of the mortgage debt, affect the rights of a subsequent purchaser or mortgagee of the property.[9]

If the mortgagee be a tenant for life of the mortgaged estate, and as such receives the rents, the statute does not run against the mortgage title.[10] The concurrence of the tenancy for life, and the right to receive the interest on the mortgage in the same individual, renders it impossible for him to make any acknowl-

[1] Pears *v.* Laing, L. R. 12 Eq. 41, 51, 54; Emory *v.* Keighan, 88 Ill. 482; Roddam *v.* Morley, 1 De G. & J. 1. In the latter case, it was held that a payment of interest by the tenant for life of a devised estate keeps a specialty alive against the persons entitled to the remainder. Lord Cranworth, in the Court of Appeals, said: "Who is affected by the payment? Does it operate against the party only by whom the payment is made? or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved not only against the party making the payment, but also against all other parties liable on the specialty." He further says that, as the statute does not so restrict the effect of the payment, the court cannot restrict it.

[2] Ward *v.* Carttar, L. R. 1 Eq. 29.

[3] Chinnery *v.* Evans, 11 H. L. C. 115.

[4] Schmucker *v.* Sibert, 18 Kans. 104.

[5] Roddam *v.* Morley, *supra;* Toft *v.* Stephenson, 1 De G., Mac. & G. 28, 40; Pears *v.* Laing, *supra.*

[6] Ames *v.* Mannering, 26 Beav. 583.

[7] Hubbard *v.* Mo. Valley L. Ins. Co. 25 Kans. 172. To the contrary see Barrett *v.* Prentiss, 57 Vt. 297.

[8] New York Life Ins. & Trust Co. *v.* Covert, 29 Barb. (N. Y.) 435.

[9] Jarvis *v.* Albro, 67 Me. 310.

[10] Wynn *v.* Styan, 2 Ph. 303; Carbery *v.* Preston, 13 Ir. Eq. 455; Burrell *v.* Egremont, 7 Beav. 205.

edgment of that title to himself; but it being his duty as such tenant to keep down the interest, the law will presume that he does so out of the rents received by him. This rule being in favor of the remainder-men, they cannot afterwards be permitted to contend that the interest thus deemed to have been kept down for their benefit was not in fact paid, and that the right to enforce the mortgage is barred by the statute; under such circumstances the statute of limitations cannot be applied against the mortgage. The presumption of payment or release of the mortgage, arising from twenty years' possession by the mortgagor, may be repelled by evidence of the payment of interest, of a promise to pay, or of an acknowledgment that the mortgage is still existing.[1]

Under a mortgage which by its terms is to be paid out of the rents and profits of the property, the statute does not run against the mortgagee. The mortgage creates a trust which is designed to run indefinitely.[2]

The receipt of rents and profits by one holding only an equitable mortgage has been held to be equivalent to a part payment.[3]

1199. If land subject to a mortgage be sold to different purchasers, one of whom pays the entire interest for more than twenty years without calling on the purchaser of another portion for contribution, the former cannot, upon purchasing the mortgage, enforce it against the latter or his grantee.[4] After such a lapse of time, by analogy to the statute of limitations, it would seem that a court of equity should conclusively presume that the parties had agreed the latter's portion should not be regarded as subject to the mortgage. Of course the holder of the mortgage, having received the payments exclusively from one part-owner, would not by that fact alone be precluded from subjecting to a foreclosure the whole property which his mortgage covered. He would have no reason to know or inquire from whom the interest came, or to whom the mortgagor had sold the land. But the conduct of the grantees of the equity of redemption in respect to the interest has a direct bearing upon the question, which of them is liable for the payment of the principal.

[1] Hough *v.* Bailey, 32 Conn. 288; Bacon *v.* McIntire, 8 Met. (Mass.) 87; Howland *v.* Shurtleff, 2 Ib. 26; Ayres *v.* Waite, 10 Cush. (Mass.) 72.

[2] Charter Oak L. Ins. Co. *v.* Stephens, 15 Pac. Rep. 253.

[3] Brocklehurst *v.* Jessop, 7 Sim. 438.

[4] Pike *v.* Goodnow, 12 Allen (Mass.), 472.

1200. The payment of taxes by the owner of the equity of redemption does not in any way contribute to make his possession hostile to the mortgagee; nor does it give him any rights against the mortgagee under a statute making seven years' payment of taxes with a record title, or a colorable one and possession, a bar to any adverse rights or proceedings; for it is his duty while in possession to pay the taxes, and the mortgagee may well regard the payment as made in his interest and not in subversion of it.[1]

1201. A purchaser assuming the payment of a mortgage recognizes it as a subsisting incumbrance, and cannot set up the statute of limitations against it until twenty years from that time have elapsed. His grantee is also bound by such admission to the same extent that he was himself bound.[2] A recital in a deed or mortgage that the premises are subject to a prior mortgage has the same effect.[3] It constitutes an admission that removes the bar of the statute as to parties to the deed.

1202. The mortgagor's grantee has no greater rights against the mortgagee than the mortgagor himself. A purchaser with actual notice of the mortgage, or constructive notice by means of a registry, can avail himself of the presumption of payment from lapse of time only when the mortgagor could avail himself of it under the same circumstances. The grantee succeeds to the estate and occupies the position of his grantor. He takes subject to the incumbrance; and his title and possession are no more adverse to the mortgagee than was the title and possession of the mortgagor.[4] The purchaser is bound by the acts and declarations of the mortgagor in respect to the mortgage while he retains the equity of redemption or any part of it; as, for instance, the purchaser of a part of the mortgaged premises cannot claim a presumption of payment of the mortgage from lapse of time when this presumption is repelled by payments of interest made by the mortgagor within twenty years, or by his admission within this time that the mortgage was then subsisting.[5] A

[1] See §§ **679, 680**; Medley *v* Elliott, 62 Ill. 532; Wright *v.* Langley, 36 Ill. 381; Hagan *v.* Parsons, 67 Ill. 170.

[2] § **744**; Harrington *v.* Slade, 22 Barb. 161; Schmucker *v.* Sibert, 18 Kans. 104.

[3] Palmer *v.* Butler, 36 Iowa, 576; Moore *v.* Clark, 40 N. J. Eq. 152.

[4] Medley *v.* Elliott, *supra;* Waterson *v.* Kirkwood, 17 Kans. 9; Grether *v.* Clark (Iowa), 39 N. W. Rep. 655.

[5] Heyer *v.* Pruyn, 7 Paige (N. Y.), 465; Hughes *v.* Edwards, 9 Wheat. 489. Mr. Justice Washington upon this point said: "It is insisted that, although these acknowledgments may be sufficient to deprive the mortgagor of a right to set up the presumption of payment or release, they cannot affect the other defendants, who purchase from him parts of the mortgaged premises for a valuable consid-

purchaser from the mortgagor stands in no better position than the mortgagor himself as to gaining title by possession and lapse of time, if the mortgage be recorded. The record is notice of the mortgage to a subsequent purchaser; and the mere fact that he has had actual possession under his purchase for the statute period of limitation is no bar to a foreclosure of the mortgage.[1]

But when a note and mortgage are once barred, although the mortgagor may, by a subsequent part payment, promise, or acknowledgment, revive the mortgage, so far as it affects his own interest in the premises, he cannot revive it as against his grantee, or any other parties who have acquired interest in the premises prior to such revivor.[2] But such renewal will revive the mortgage as against a junior mortgagee whose mortgage was taken before the statute of limitations ran against the prior mortgage, if no new equities were acquired by the junior mortgagee after the statute had run and before the debt was renewed. The junior mortgagee, after the bar of the statute has been removed by the new promise, is in no different condition than he was when he acquired his interest.[3]

In California, however, it is the settled doctrine that the mortgagor has no power by stipulation to prolong the time of payment of his mortgage as against others who have acquired interests in the equity of redemption, either as subsequent incumbrancers or purchasers of the equity of redemption;[4] for against them he can neither suspend the running of the statute of limitations by an express waiver nor by his voluntary act in absenting himself from the state.[5] In fact, under the provisions of the code of this state a mortgage can only be renewed by a writing executed with the formalities required in the case of the original mortgage. The mortgage cannot be renewed simply by a renewal of the note.[6]

1203. The statute of limitations does not discharge the

eration. The conclusive answer to this argument is, that they were purchasers with notice of this incumbrance."

[1] Thayer *v.* Cramer, 1 McCord (S. C.) Ch. 395; Mitchell *v.* Bogan, 11 Rich. (S. C.) 686, 706; Wright *v.* Eaves, 5 Rich. Eq. (S. C.) 81; Norton *v.* Lewis, 3 S. C. 25; Lynch *v.* Hancock, 14 S. C. 66.

[2] Schmucker *v.* Sibert, 18 Kans. 104.

[3] Herndt *v.* Porterfield (Iowa, 1881), 9 N. W. Rep. 322.

[4] Sichel *v.* Carrillo, 42 Cal. 493; Barber *v.* Babel, 36 Cal. 11; Lent *v.* Shear, 26 Cal. 361.

[5] Wood *v.* Goodfellow, 43 Cal. 185. The authority and correctness of this decision is denied in Waterson *v.* Kirkwood, 17 Kans. 9; Schmucker *v.* Sibert, *supra;* Clinton County *v.* Cox, 37 Iowa, 570.

[6] Wells *v.* Harter, 56 Cal. 342.

debt or extinguish the right, but only takes away the remedy. This is the rule even in California and other states where it is held, as already noticed, that when the debt is barred the mortgage is also rendered unavailable. The debt and the mortgage are distinct causes of action, and distinct remedies may be pursued upon them.[1] The recent English Statutes of Limitations, beginning with that of William IV., operate by their direct terms as a bar to the right, and not, like the statute of James I., upon which the statutes in this country are generally founded, as a bar to the remedy only.[2] The effect, therefore, of the new enactments in England is not simply to exclude the recovery, but to transfer the estate.[3] "This," says Lord St. Leonards, "is a great improvement."[4] This change in the statute does not affect the questions under consideration, inasmuch as the recent acts have contained special provisions relating to mortgages. In America the statutes of limitations being generally founded upon the earlier English statutes, the same doctrine, that the effect of the statute is merely to take away the remedy and not to extinguish the debt, which prevailed in England under those statutes, prevails here as well.[5]

The commencement of foreclosure proceedings arrests the running of the statute of limitations, even as against persons who are not made parties to the suit.[6]

1204. Though the debt be barred the lien may be enforced. The fact that a debt secured by a mortgage is barred by a statute of limitations does not necessarily, or as a general rule, extinguish the mortgage security, or prevent the maintaining of an action to enforce it.[7] The statute of limitations does not in any

[1] Sichel *v.* Carrillo, 42 Cal. 493; Low *v.* Allen, 26 Cal. 141; Lent *v.* Shear, 26 Cal. 361; Grant *v.* Burr, 54 Cal. 298.

[2] Beckford *v.* Wade, 17 Ves. 87; Incorporated Society *v.* Richards, 1 Dru. & War. 258, 289; Higgins *v.* Scott, 2 B. & Ad. 413.

[3] 3 & 4 Will. 4, ch. 27, § 34; 37 & 38 Vict. ch. 57. See per Lord St. Leonards, in Dundee Harbor *v.* Dougall, 1 Macq. H. L. C. 321.

[4] Charley's Real Prop. Acts, 3d ed. p. 26.

[5] Waltermire *v.* Westover, 14 N. Y. 16; Pratt *v.* Huggins, 29 Barb. 277. In this case Mr. Justice Hogeboom said: "It is said that the note, from the lapse of time, is presumed to be paid. Not altogether so; for the law allows a suit upon it, and a recovery, unless the statute of limitations is pleaded. It is therefore, at most, but a presumption; suffered to be overthrown, it is true, only in one way, and that is by proof of payment thereon, or recognition thereof, in the way pointed out in the statute. This, however, as before stated, only acts upon the remedy."

[6] Emory *v.* Keighan, 88 Ill. 482; Kibbe *v.* Thompson, 5 Biss. 206.

[7] **England**: Higgins *v.* Scott, *supra;* Spears *v.* Hartly, 3 Espin. 81. **United States**: Sparks *v.* Pico, 1 McAll. 497;

way apply to the mortgage security. It remains in force until the debt which it secures is paid. Payment may be established not only by direct evidence, but also by the presumption of law arising from the lapse of twenty years from the time when the cause of action accrued; a presumption which may be countervailed by evidence tending to show a contrary presumption.[1]

1205. The mortgagee may retain possession till the debt is paid. Although the right to proceed by action on the mortgage is barred, still, if the mortgagee can obtain rightful possession of the premises, he may retain them until the debt is paid.[2]

1206. There may be a decree for the deficiency although the debt be barred. A court of equity is not precluded, in a

Sturges *v.* Crowninshield, 4 Wheat. 122; Hughes *v.* Edwards, 9 Wheat. 489; Union Bank of Louisiana *v.* Stafford, 12 How. 327, 340; Townsend *v.* Jemison, 9 How. 407, 413; M'Elmoyle *v.* Cohen, 13 Pet. 312. **Massachusetts**: Thayer *v.* Mann, 19 Pick. 535; Eastman *v.* Foster, 8 Met. 19; Crain *v.* Paine, 4 Cush. 483; Ball *v.* Wyeth, 8 Allen, 275; Norton *v.* Parker, 142 Mass. 433. **Virginia**: Smith *v.* Washington City, &c. R. R. Co. 33 Gratt. 617; Coles *v.* Withers, 33 Gratt. 186; Hanna *v.* Wilson, 3 Gratt. 243. **Nevada**: Henry *v.* Confidence Gold & Silver M. Co. 1 Nev. 619; Read *v.* Edwards, 2 Nev. 262; Mackie *v.* Lansing, 2 Nev. 302; Cookes *v.* Culbertson, 9 Nev. 199. **Wisconsin**: Cleveland *v.* Harrison, 15 Wis. 670; Wiswell *v.* Baxter, 20 Wis. 680; Whipple *v.* Barnes, 21 Wis. 327; Knox *v.* Galligan, 21 Wis. 470; Kennedy *v.* Knight, 21 Wis. 340; Potter *v.* Strausky, 48 Wis. 235; Cerney *v.* Pawlot, 66 Wis. 262. **Ohio**: Fisher *v.* Mossman, 11 Ohio St. 42; Gary *v.* May, 16 Ohio, 66; Longworth *v.* Taylor, 2 Cin. Supt. Ct. Rep. 39. **Mississippi**: Wilkinson *v.* Flowers, 37 Miss. 579; Nevitt *v.* Bacon, 32 Miss. 212; Trotter *v.* Erwin, 27 Miss. 772. **New York**: Waltermire *v.* Westover, 14 N. Y. 16, 20; Pratt *v.* Huggins, 29 Barb. 277; Heyer *v.* Pruyn, 7 Paige, 465, in which Chancellor Walworth denies the authority to the contrary of Jackson *v.* Sackett, 7 Wend. 94. **Maryland**: Ohio Life Ins. & Trust Co. *v.* Winn, 4 Md. Ch. Dec. 253. **Georgia**: Elkins *v.* Edwards, 9 Ga. 326. **Oregon**: Myer *v.* Beal, 5 Oreg. 130. **Kentucky**: Kellar *v.* Sinton, 14 B. Mon. 307. **Arkansas**: Birnie *v.* Main, 29 Ark. 591; Coldcleugh *v.* Johnson, 34 Ark. 312. Now otherwise by Acts 1887, ch. 104. **Vermont**: Richmond *v.* Aiken, 25 Vt. 324. **Connecticut**: Baldwin *v.* Norton, 2 Conn. 163; Hough *v.* Bailey, 32 Conn. 288; Belknap *v.* Gleason, 11 Conn. 160. **Florida**: Browne *v.* Browne, 17 Fla. 607. **Tennessee**: Harris *v.* Vaughn, 2 Tenn. Ch. 483. **New Jersey**: Barned *v.* Barned, 21 N. J. Eq. 245. **Maine**: Crooker *v.* Holmes, 65 Me. 195; Joy *v.* Adams, 26 Me. 330. **South Carolina**: Nichols *v.* Briggs, 18 S. C. 473; Dearman *v.* Trimmier, 2 S. E. Rep. 501, 505, per McIver, J. **Missouri**: Lewis *v.* Schwenn, 2 S. W. Rep. 391; Wood *v.* Augustine, 61 Mo. 46; Cape Girardeau Co. *v.* Harbison, 58 Mo. 90. **Indiana**: Where the mortgage contains a covenant to pay the debt secured. Crawford *v.* Hazelrigg, 18 N. E. Rep. 603. **Texas**: Fievel *v.* Zuber, 67 Tex. 275; Goldfrank *v.* Young, 64 Tex. 432, overruling Blackwell *v.* Barnett, 52 Tex. 326, 331.

An agreement by the mortgagee to extend the right to redeem, and not to foreclose for a specified time, does not extend the personal liability of the mortgagor beyond the time when it would otherwise be barred by the statute of limitations.

[1] Joy *v.* Adams, 26 Me. 330, 333.

[2] See §§ **715, 716**; Henry *v.* Confidence Gold & Silver M. Co. *supra*; Van Dyne *v.* Thayre, 14 Wend. (N. Y.) 233; Phyfe *v.* Riley, 15 Ib. 248.

suit for the foreclosure of the mortgage given to secure the debt, from rendering a decree against the mortgagor for any remainder of the debt not satisfied by the sale. This is on the ground that such a decree is an incident to the decree of foreclosure, and that when a court of equity once takes jurisdiction of a case it will retain it for the purpose of complete relief.[1]

1207. In a few states the mortgage lien is discharged when the debt is barred. The statutes in these states limit suits in equity in the same manner as suits at law, and the debt being barred by the statute, the mortgage is in effect extinguished. This is the rule established in California. Chief Justice Field, giving the opinion of the court, in addition to the special ground of the decision founded upon the peculiarity of the statute of limitations of that state, intimates that, by the doctrine of mortgages established there, when the debt is barred by the statute of limitation, the mortgage, being considered a mere incident to it, is also barred, or at least rendered unavailable for any purpose.[2] In fact the mortgage, not being regarded as a conveyance in fee, but only a contract creating a lien or charge upon the property, comes within the same general limitation as the note or other obliga-

[1] Birnie *v.* Main, 29 Ark. 591.

[2] Lord *v.* Morris, 18 Cal. 482. Mr. Chief Justice Field said: "The statute of limitations of this state differs essentially from the statute of James I., and from the statutes of limitations in force in most of the other states. Those statutes apply in their terms only to particular legal remedies, and hence courts of equity are said not to be bound by them except in cases of concurrent jurisdiction. In other cases courts of equity are said to act merely by analogy to the statutes, and not in obedience to them. Those statutes, as a general thing, also apply, so far as actions upon written contracts not of record are concerned, only to actions upon simple contracts, — that is, contracts not under seal, fixing the limitation at six years, and leaving actions upon specialties to be met by the presumption established by the rule of the common law, that after a lapse of twenty years the claim has been satisfied. In those statutes where specialties are mentioned, as in the statutes of Ohio and Georgia, the limitation is generally fixed at either fifteen or twenty years. The case is entirely different in this state. Here the statute applies equally to actions at law and to suits in equity. It is directed to the subject matter and not to the form of the action, or the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. Thus the statute requires an action 'upon any contract, obligation, or liability, founded upon an instrument of writing,' except a judgment or decree of a court of a state or territory, or of the United States, to be commenced within four years after the cause of action has accrued. . . . We do not question the correctness of the general doctrine prevailing in the courts of several of the states, that a mortgage remains in force until the debt for the security of which it is given is paid. We only hold that the doctrine has no application under the statute of limitations of this state." See, also, Low *v.* Allen, 26 Cal. 141; Lent *v.* Morrill, 25 Cal. 492.

tion secured by it. Just as much as the note, it is a "contract, obligation, or liability, founded upon an instrument in writing," within the terms of the statute. The same rule has been established in Nevada, Texas, and Nebraska, upon the ground that the mortgage is a mere security for a debt, and the mortgagor the owner of the land.[1] In Indiana,[2] Iowa,[3] Illinois,[4] Kansas,[5] and Mississippi,[6] also, the mortgage is regarded as a mere incident following the debt, which is the principal thing, for which it stands security, and therefore the remedy upon the mortgage is barred when that upon the debt is lost, and not till then.

Under this rule the mortgage lien is barred when the debt is barred, although at the time the note and mortgage become due and afterwards the mortgagor holds a claim against the holder of the note and mortgage, which he might use as a set-off if suit were brought thereon; unless the holder of the note and mortgage should recognize and allow such claim.[7]

In these states the statutory period of limitation commences to run from the time the debt becomes due.[8]

But in California it is held that a trust deed is not a mortgage requiring a judicial foreclosure, but is a conveyance of the legal title; that, although the debt be barred by limitation, it is not extinguished or paid; and therefore the legal title and power of the trustee are not affected by the expiration of the period prescribed to bar the debt, and a court of equity will not interfere to enjoin a sale under the deed.[9]

The statute of limitations of these states is wholly unlike that of England, and of those states which have adhered to the com-

[1] Duty *v.* Graham, 12 Tex. 427; Wells *v.* Harter, 56 Cal. 342; Blackwell *v.* Barnett, 52 Tex. 326; Perkins *v.* Sterne, 23 Tex. 561; Ross *v.* Mitchell, 28 Tex. 150; Daggs *v.* Ewell, 3 Woods, 344; Kyger *v.* Ryley, 2 Neb. 20; Peters *v.* Dunnells, 5 Neb. 400; Hurley *v.* Estes, 6 Neb. 386; Henry *v.* Confidence Gold & Silver M. Co. 1 Nev. 619; Hurley *v.* Cox, 9 Neb. 230.

[2] When the mortgage contains no covenant to pay. Lilly *v.* Dunn, 96 Ind. 220.

[3] Gower *v.* Winchester, 33 Iowa, 303; Burton *v.* Hintrager, 18 Iowa, 438; Sangster *v.* Love, 11 Iowa, 580; Crow *v.* Vance, 4 Iowa, 434; Green *v.* Turner, 38 Iowa, 112; Newman *v.* De Lorimer, 19 Iowa, 244; Clinton County *v.* Cox, 37 Iowa, 570; Mahon *v.* Cooley, 36 Iowa, 479; Brown *v.* Rockhold, 49 Iowa, 282.

[4] Pollock *v.* Maison, 41 Ill. 516; Hagan *v.* Parsons, 67 Ill. 170; Emory *v.* Keighan, 94 Ill. 543; *S. C.* 88 Ill. 482.

[5] Fort Scott, *v.* Schulenberg, 22 Kans. 648; Schmucker *v.* Sibert, 18 Kans. 104; Hubbard *v.* Mo. Valley L. Ins. Co. 25 Kans. 172.

[6] R. Code 1880, § 2667.

[7] Hubbard *v.* Mo. Valley L. Ins. Co. *supra.*

[8] Bassett *v.* Monte Christo Mining Co. 15 Nev. 293.

[9] Grant *v.* Burr, 54 Cal. 298.

mon law forms of action. The latter statutes apply in terms only to actions at law; and courts of equity in general act merely in analogy to the statutes, and not in obedience to them. But in states where the distinctions between actions at law and suits in equity is done away with, the statutes of limitation apply equally to both classes of cases; and therefore a suit to foreclose a mortgage must be brought within the time limited for an action upon the note secured by it.[1] A purchaser of the equity of redemption may interpose this defence to the foreclosure of a mortgage, whether the mortgagor does or not.[2]

The mere fact of posting notices at a trust sale by a trustee before the debt secured by the trust deed is barred, but not in time to make the sale before the bar of limitation would be complete, cannot be held equivalent to the institution of an "action or suit," which would suspend the running of the limitation.[3]

In equity a mortgage is always regarded merely as a security for the debt. The debt is the principal thing, and the mortgage an incident only. But the note or bond which accompanies the mortgage may also be regarded as an incident or evidence of the debt, especially if the mortgage itself contains a covenant for the payment of it.[4] The doctrine that there can be no remedy upon the mortgage after the remedy upon the note is barred cannot properly rest upon this foundation. If not based upon the express terms of the statute of limitations, it must rest upon the statutory declaration made in several states, that a mortgage is not to be deemed a conveyance of the land, but only a contract lien upon it.[5] Yet in Illinois when the debt is barred the remedy on the mortgage is barred also; and the decisions are placed upon the ground that the debt is the principal thing; that an assign-

[1] Chick *v.* Willetts, 2 Kansas, 384; Schmucker *v.* Sibert, 18 Kans. 104.

[2] Schmucker *v.* Sibert, *supra.*

[3] Blackwell *v.* Barnett, 52 Tex. 326.

[4] Pratt *v.* Huggins, 29 Barb. (N. Y.) 277.

[5] Lord *v.* Morris, 18 Cal. 482. Chief Justice Field said: "Here a mortgage is regarded, as between the parties, as well as with reference to the rights of the mortgagor in his dealings with third persons, as a mere security, creating a lien or charge upon the property, and not as a conveyance vesting any estate in the premises, either before or after condition broken. Here it confers no right to the possession of the premises either before or after default, and, of course, furnishes no support to an action of ejectment, or to a writ of entry for their recovery. The language of the statute is express that it shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession without a foreclosure and sale." And see Jackson *v.* Lodge, 36 Cal. 28; Carpentier *v.* Brenham, 40 Cal. 221; Harp *v.* Calahan, 46 Cal. 222.

ment of this carries with it the mortgage; that the release of it releases the mortgage; and that by analogy there is no reason why a bar to a recovery on the note should not produce the same effect on the mortgage. It is conceded, however, that when the mortgage itself contains a covenant for the payment of the debt, this being an instrument under seal, although a mortgage note not under seal might be barred under a shorter period of limitation than that required to bar a sealed instrument, the remedy upon the mortgage would be barred only by the lapse of the longer period required to bar a recovery on sealed instruments.[1]

On the other hand, so long as the statute does not bar a recovery on the note, it does not bar a foreclosure of the mortgage.[2] If by the non-residence of the mortgagor time be deducted from the period of limitation, so that an action on the debt is not barred, neither is an action to foreclose the mortgage barred.[3]

1208. It is immaterial whether the adverse possession be that of one person for the whole period, or that of several persons holding in succession each for a part of the period, provided the possession be uninterrupted and adverse; but if a period of time intervenes when the possession is not adverse, the statute only runs from the commencement of the last adverse possession.[4]

Moreover, as against the mortgagee under the English statute,[5] the adverse possession must have commenced under the mortgage, so that an occupation previous to the making of the mortgage cannot be added to an occupation afterwards to make up the period of twenty years; therefore it may happen that while the mortgagor is barred from recovery the mortgagee is not.[6] The payment of interest by the mortgagor may prevent the running of the statute against the mortgagee, while the person in possession under the mortgagor, holding for more than twenty years without paying rent or making acknowledgment of any kind, has acquired title against him.

[1] Harris *v.* Mills, 28 Ill. 44; Hagan *v.* Parsons, 67 Ill. 170; Brown *v.* Devine, 61 Ill. 260; Pollock *v.* Maison, 41 Ill. 516.

[2] Schmucker *v.* Sibert, 18 Kans. 104.

[3] Clinton County *v.* Cox, 37 Iowa, 570; Brown *v.* Rockhold, 49 Iowa, 282; *S. C.* 7 Cent. L. J. 416; Emery *v.* Keighan, 94 Ill. 543.

[4] Emory *v.* Keighan, 88 Ill. 482; *S. C.* 11 Chicago L. N. 32; Benson *v.* Stewart, 30 Miss. 49.

[5] 7 Wm. 4 & 1 Vict. ch. 28.

[6] Palmer *v.* Eyre, 17 Q. B. 366; Baddeley *v.* Massey, 17 Q. B. 373; Ford *v.* Ager, 2 H. & C. 279; *S. C.* 8 L. T. N. S. 546.

An adverse possession, which includes the period during which a stay law was in force, is not effectual against a mortgagee.[1]

1209. An action to enforce an equitable lien for purchase money is on the contrary barred when the debt itself is barred.[2] Such a lien arises by operation of law and is not created or evidenced by deed. It must coexist with the debt and cannot survive that.

1210. The statute runs in favor of the mortgagor from the time the mortgagee's right of action accrues, that is, from the time the condition of the mortgage is broken.[3] Unless the time commences to run from the time when the right to foreclose accrues, it could have no commencement except in rare instances, and the right to foreclose might be asserted against the continued possession of the mortgagor at the most remote period. From that time the mortgagor holds subject to the right of the mortgagee to foreclose, and if the mortgagee sleeps upon that right, if any lapse of time is to bar his claim upon the presumption that it has been paid, the period must commence from the accruing of his right of action.

If a suit for foreclosure be regarded as a proceeding *in rem*, the absence of the mortgagor from the state does not prevent the running of the statute on the mortgagee's right to foreclose. His absence does not interfere with the prosecution of his remedy, or render it less effectual.[4] But on the other hand if such a suit be regarded as a proceeding *in personam* rather than one *in rem*, a provision of a statute of limitations, that in case the defendant be absent from the state when the cause of action accrues, the action may be commenced within the time limited, after his return to the state, applies to a foreclosure suit.[5]

[1] Lynch *v.* Hancock, 14 S. C. 66.

[2] Borst *v.* Corey, 15 N. Y. 505. Mr. Justice Bowen said: "There is a material distinction between a mortgage and the equitable lien for the purchase price of land given by law, and also between an action to foreclose a mortgage and one to enforce a lien. The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and, by reason of the seal, the debt is not presumed to have been paid until the expiration of twenty years after it becomes due and payable. The six years' limitation has no application to a mortgage. In fact, all instruments under seal are expressly excepted therefrom." To the same effect see Trotter *v.* Erwin, 27 Miss. 772; Littlejohn *v.* Gordon, 32 Miss. 235.

[3] Nevitt *v.* Bacon, 32 Miss. 212; Benson *v.* Stewart, 30 Miss. 49; Wilkinson *v.* Flowers, 37 Miss. 579; Coyle *v.* Wilkins, 57 Ala. 107; Smith *v.* Niagara F. Ins. Co. (Vt.) 15 Atl. Rep. 353.

[4] Anderson *v.* Baxter, 4 Oreg. 105.

[5] Whalley *v.* Eldridge, 24 Minn. 358.

1211. The possession of the mortgagor or his grantees is presumed to be subordinate to the mortgage, until it is shown by some act that such possession is inconsistent with the rights of the mortgagee.[1] The possession must be hostile in its inception, and must continue hostile, actual, visible, and distinct.[2] So long as the relation of mortgagor and mortgagee continues, the statute cannot commence to run in favor of the mortgagor or his heirs. The recovery of a judgment on *scire facias* to foreclose a mortgage does not extinguish the relation; until the time of redemption allowed by law after a foreclosure sale has expired, so that the purchaser is entitled to a deed of the premises, the statute does not begin to run.[3]

After a foreclosure sale the statute of limitations begins to run against the purchaser, at least, when the deed under the sale is given, whether the purchaser be the mortgagee or a third person.[4]

The possession of the mortgagor being in the beginning consistent with the right of the mortgagee, it becomes important to determine when it becomes adverse, and such that the limitation begins to run in the mortgagor's favor. Is it adverse from the time that he ceases to pay interest upon the mortgage debt? "It seems to me," says Lord Denman, Chief Justice, "that it is not so. The possession of the mortgagor is consistent with the right of the mortgagee; and, therefore, the possession is not adverse at any assignable period, unless the jury, from renunciation by the mortgagor or some other circumstances, are induced to find the fact of adverse possession."[5]

Possession by one who has entered upon the land, under a contract with the mortgagor, to pay off the mortgage debt, is not adverse to the mortgagee.[6]

It is not material to make out that the mortgagor's possession

[1] Maxwell *v.* Hartmann, 50 Wis. 660.

[2] Medley *v.* Elliott, 62 Ill. 532; Martin *v.* Jackson, 27 Pa. St. 504; Parker *v.* Banks, 79 N. C. 480; Birnie *v.* Maine, 29 Ark. 591; Coldcleugh *v.* Johnson, 34 Ark. 312; Coyle *v.* Wilkins, 57 Ala. 108.

[3] Rockwell *v.* Servant, 63 Ill. 424; Jamison *v.* Perry, 38 Iowa, 14.

[4] Grether *v.* Clark (Iowa), 39 N. W. Rep. 655.

[5] Jones *v.* Williams, 5 Ad. & El. 291. Mr. Justice Patterson in this case said: "One is much at a loss as to the proper terms in which to describe the relation of mortgagor in possession and mortgagee. In Partridge *v.* Bere, 5 B. & Ald. 604, such mortgagor is held to be tenant to the mortgagee; sometimes he is said to be the bailiff of the mortgagee; and in a late case Lord Tenterden said that his situation was of a peculiar character. But it is clear that his possession is, at all events, not adverse to the title of the mortgagee."

[6] Wilkerson *v.* Allen, 67 Mo. 502.

from that time is actually adverse to the right of the mortgagee, if it is from that time without recognition of it. It is deemed adverse in law after breach of the condition.[1]

The period of limitation runs of course from the time when the mortgagee's right of action accrues, and not from the date or delivery of the mortgage.[2] When a mortgage is payable in instalments falling due at different times, the mortgagor's possession is not adverse until the maturity of the last instalment. The condition of the mortgage in such case is a continuing one, and the mortgagee may await the maturity of the last note before an entry and sale, or before treating the non-payment of the earlier instalments as a forfeiture of the mortgage.[3]

Where a mortgage is in the form of an absolute conveyance and the grantor continues in possession, such possession is not adverse, so as to start the running of the statute of limitations, until the grantor disclaims the trust relation of his possession, and gives notice of that fact to the grantee.[4]

1212. If, however, the mortgagor has not been in possession of the mortgaged land, the debt being unpaid, the right to foreclose is not barred by the lapse of the statutory period of limitation. This condition of things frequently happens when the mortgaged lands are wild and unimproved. The lapse of thirty years has been held to be no bar to a foreclosure in such a case.[5] Even the lapse of thirty-five years, during the most of which period the mortgagor was out of the state and had apparently abandoned his equity of redemption, and the mortgagee had asserted his claim by the sale of a part of the premises, and by paying taxes every year on the remainder, was held not to bar him.[6]

1213. If the mortgage be one of indemnity to a surety, his right of action does not accrue until he has paid the debt which the mortgage was given to secure him against, and therefore the time of limitation for his bringing an action to foreclose the mortgage commences to run only from that time.[7]

1214. The same rule applies in case of a debt barred by a special statute of limitations. Thus, the rule applies to a particular statute limiting the time within which claims against the

[1] Wilkinson *v.* Flowers, 37 Miss. 579.

[2] Prouty *v.* Eaton, 41 Barb. (N. Y.) 409; Delano *v.* Smith, 142 Mass. 490.

[3] Parker *v.* Banks, 79 N. C. 480.

[4] Flynn *v.* Lee (W. Va.), 7 S. E. Rep. 430.

[5] Chouteau *v.* Burlando, 20 Mo. 482.

[6] Locke *v.* Caldwell, 91 Ill. 417.

[7] M'Lean *v.* Ragsdale, 31 Mass. 701.

estate of a deceased person must be presented or sued. The debt is not paid or satisfied by failure to present or sue it within the time limited; and the remedy on the mortgage may still be pursued.[1]

1214 *a*. A bill in equity to have the mortgage cancelled and to remove the cloud from the title may be maintained by the mortgagor or by his vendee or mortgagee after the mortgage has become barred by the statute. The title is then clouded with an invalid lien, and any party interested in the title is entitled to have the cloud removed.[2]

1214 *b*. The privilege of the plea of the statute of limitations may be set up not only by the mortgagor but by a subsequent purchaser of the property. In the latter case the plea must show that the action is barred as between the parties to the debt, because it is that debt the purchaser has to pay.[3]

In Georgia, however, the privilege is a personal one, which the mortgagor may avail himself of or not, as he may choose, and a subsequent purchaser cannot have a foreclosure sale set aside because the mortgagor did not plead the bar of the statute.[4]

[1] Sichel *v.* Carrillo, 42 Cal. 493. In this case the mortgage was given to secure the note of another person, so that there was no personal liability of the mortgagor. When the maker of the note and mortgage are the same person, the court say it may be that it would be necessary to present the claim to prevent a bar, and keep the remedy alive as to the debt, in order to uphold the remedy on the mortgage. This, however, would be on account of the exceptional character of the statutes of limitation in that state, and of the exceptional views taken there of the force and effect of a mortgage. The rule stated in the text is of general application, and without any such qualification elsewhere. In **Texas**, under special requirement of statute, the debt must be presented against the estate of the deceased before any action can be had on the mortgage. Graham *v.* Vining, 1 Tex. 639; Duty *v.* Graham, 12 Tex. 427.

[2] Fox *v.* Blossom, 17 Blatchf. 352. See Delano *v.* Smith, 142 Mass. 490.

[3] Ewell *v.* Daggs, 108 U. S. 143.

[4] Sanger *v.* Nightingale, 7 Sup. Ct. Rep. 1109.

CHAPTER XXVII.

REMEDIES FOR ENFORCING A MORTGAGE.

I. Are concurrent, 1215–1219.
II. Personal remedy before foreclosure, 1220–1226.
III. Personal remedy after foreclosure, 1227, 1228.
IV. Sale of mortgaged premises on execution for mortgage debt, 1229, 1230.
V. Remedy as affected by bankruptcy, 1231–1236.

I. *Are Concurrent.*

1215. The mortgagee may pursue all his remedies concurrently or successively.[1] He may at the same time sue the mortgagor in an action at law upon the note, or other personal debt; may maintain a writ of entry or ejectment to recover possession of the land, and a bill in equity to foreclose the mortgage. Recovery of judgment upon the note does not, without payment, take it out of the mortgage, or bar proceedings to foreclose. The cause of action on the debt is personal against the person and property of the debtor; and the proceedings to foreclose are to enforce the lien upon the debtor's real estate which he has charged with the payment of the debt.[2]

The mortgage and the evidence of debt are usually separate instruments and afford independent remedies. The mortgage may be wholly discharged or released without affecting the per-

[1] Garforth *v.* Bradley, 2 Ves. Sen. 678; Torrey *v.* Cook, 116 Mass. 163; Ely *v.* Ely, 6 Gray (Mass.), 439; Draper *v.* Mann, 117 Mass. 439; Hughes *v.* Edwards, 9 Wheat. 489; Brown *v.* Stewart, 1 Md. Ch. 87; Wilhelm *v.* Lee, 2 Md. Ch. 322; Pratt *v.* Huggins, 29 Barb. (N. Y.) 277; Jackson *v.* Hull, 10 Johns. N. Y. 481; Cross *v.* Burns, 17 Ind. 441; Jones *v.* Conde, 6 Johns. (N. Y.) Ch. 77; Very *v.* Watkins, 18 Ark. 546; Knetzer *v.* Bradstreet, 1 Greene (Iowa), 382; Smith *v.* Shuler, 12 S. & R. (Pa.) 240; Coit *v.* Fitch, Kirby (Conn.), 254; Wilkinson *v.* Flowers, 37 Miss. 579; Wiswell *v.* Baxter, 20 Wis. 680; Whipple *v.* Barnes, 21 Wis. 327; Knox *v.* Galligan, Ib. 470; Banta *v.* Wood, 32 Iowa, 469; Brown *v.* Cascaden, 43 Iowa, 103; Micou *v.* Ashurst, 55 Ala. 607; Scott *v.* Ware, 64 Ala. 174; Stephens *v.* Greene County Iron Co. 11 Heisk. (Tenn.) 71; Delespine *v.* Campbell, 52 Tex. 4. In the present state of the law, when there is no prohibition by statute, it is competent for the mortgagee to pursue three remedies at the same time. Mr. Justice Swayne, in Gilman *v.* Ill. & Miss. Tel. Co. 91 U. S. 603; Morrison *v.* Buckner, Hemp. 442.

[2] Conn. Mut. L. Ins. Co. *v.* Jones, 1 McCrary, 388.

sonal liability of the mortgagor; and on the other hand, the personal liability may be terminated by the statute of limitations, or by a discharge in bankruptcy or insolvency, without extinguishing the mortgage.[1] Such is also the case if the mortgage note be made invalid by alteration.[2] So long ago as the case of *Burnell* v. *Martin*,[3] Lord Mansfield declared "that it had been settled over and over again that a person in such case is at liberty to persue all his remedies at once." He may pursue his legal and equitable remedies at the same time; he may foreclose, take possession of the estate, or bring ejectment for it, and sue the mortgagor on his covenant or other obligation for the debt.[4] When not restrained from entering he may maintain ejectment without previous demand of payment, or entry, or notice to quit.[5] After a mortgage is due the mortgagee may at any time, without notice or demand of payment, take proceedings to collect the debt or to realize his security.[6]

When a mortgage is given by a corporation to secure a large loan it is usual to divide the mortgage debt into numerous bonds or notes, which are payable to bearer and are transferred by delivery, and are widely distributed, while the mortgaged property is held by trustees for the protection of all the numerous holders. In such case, while the individual bondholders may obtain judgments for their several bonds, they cannot levy execution upon the mortgaged property and acquire a preference over other bondholders secured by the same mortgage.[7] The mortgage security must usually be enforced by the trustees of the mortgage title, though in certain contingencies, as when the trustees neglect or refuse to perform the trust, individual bondholders may institute proceedings to foreclose the mortgage. But they must do this in behalf of all the bondholders.

1216. This rule is an exception to the general principle that a debtor shall not be harassed by a multiplicity of suits for the same debt at the same time. Lord Redesdale[8] states the general rule to be, that where a party is suing in equity he shall not be allowed to sue at law for the same debt. "But the case of

[1] Toplis *v.* Baker, 2 Cox, 123; Thayer *v.* Mann, 19 Pick. (Mass.) 535; Buchanan *v.* Berkshire L. Ins. Co. 96 Ind. 510, 519.

[2] Gillette *v.* Smith, 18 Hun (N. Y.), 10.

[3] 2 Doug. 417.

[4] Cockell *v.* Bacon, 16 Beav. 158.

[5] New Haven Sav. Bank *v.* McPartlan, 40 Conn. 90.

[6] Letts *v.* Hutchins, L. R. 13 Eq. 176; Harris *v.* Mulock, 9 How. (N. Y.) Pr. 402.

[7] Jones on Railroad Securities, §§ 434, 477.

[8] In Schoole *v.* Sall, 1 Sch. & Lef. 176.

a mortgagee is an exception to this rule; he has a right to proceed on his mortgage in equity and on his bond at law at the same time." There may be some special equity in favor of the mortgagor which will make an exception to this rule;[1] and in some states this right of concurrent action has been restricted by statute.[2]

1217. A mortgagee may maintain a creditor's bill in equity to reach and apply, in payment of his debt, property of the debtor which cannot be come at to be attached or taken on execution. This remedy is in the nature of an attachment by an equitable trustee process; and there is no reason why it should not be pursued just as the mortgagee might make direct attachment of any property other than the mortgaged estate.[3]

1218. The right to foreclose is not waived or impaired by the recovery of a judgment at law upon the mortgage debt.[4] The causes of action are not legally the same; one is a personal, the other a real action. Obtaining a judgment on the note does not take it out of the mortgage;[5] and while it remains unsatisfied the conditional judgment in the suit to foreclose must be entered the same as if the note had not been the subject of a suit. Nor does a provision in the mortgage, that in case of a breach of the condition the mortgagee may enter and receive the rents and profits for his indemnity, prevent a foreclosure and sale as in other cases.[6]

The fact that the mortgagee has proved his claim against the estate of his deceased mortgagor and obtained an order for its payment does not constitute a bar to a proceeding to foreclose the mortgage.[7] On the other hand, the mortgage creditor is not barred in his action to foreclose his mortgage, by reason that he has not proved his claim against the estate of a deceased debtor and there has been a final settlement of that estate.[8]

On the other hand, it is sometimes provided that the mortgage shall not be foreclosed until the personal remedy is first had. A

[1] Booth *v.* Booth, 2 Atk. 343; Newbold *v.* Newbold, 1 Del. Ch. 310.

[2] See § **1223**.

[3] Tucker *v.* McDonald, 105 Mass. 423; Palmer *v.* Foote, 7 Paige (N. Y.), 437.

[4] Duck *v.* Wilson, 19 Ind. 190; O'Leary *v.* Snediker, 16 Ind. 404; Wahl *v.* Phillips, 12 Iowa, 81; Thornton *v.* Pigg, 24 Mo. 249; Karnes *v.* Lloyd, 52 Ill. 113; Vansant *v.* Allmon, 23 Ill. 30, 33; Banta *v.* Wood, 32 Iowa, 469.

[5] See § **936**.

[6] Harkins *v.* Forsyth, 11 Leigh (Va.), 294.

[7] Simms *v.* Richardson, 32 Ark. 297; Jones *v.* Null, 9 Neb. 57.

[8] McCallam *v.* Pleasants, 67 Ind. 542; Bell *v.* Hobaugh, 65 Ind. 598.

stipulation in such a mortgage, that the property of the makers of the note should be exhausted before foreclosure, is complied with when a judgment has been obtained on the note and the execution has been returned unsatisfied for want of property. The creditor is not bound to try to collect the judgment out of the equities of the judgment debtors in the mortgaged premises, or out of other property, when these are wholly insufficient.[1]

1219. Subsequent payment will discharge both the judgment against the person and that against the property.[2] Satisfaction of the debt in whatever way it be made, whether it be upon a judgment at law, or upon a decree in equity made in respect of the same mortgage, satisfies and discharges all the proceedings taken to enforce the debt either against the person or the property.[3]

Although as a general rule a mortgagor upon payment of the mortgage is entitled to have the property restored or released to him, yet this right cannot be claimed after a sale under a power when suit is brought upon the mortgage debt for a balance remaining unsatisfied by the sale.[4]

II. *Personal Remedy before Foreclosure.*

1220. The holder of the note and mortgage is not required first to foreclose the mortgage, but may bring his action on the note alone. The fact that the mortgagor has sold the mortgaged premises to a third person subject to the mortgage debt does not change the right of the holder to pursue the personal remedy. The debt is the primary obligation between the parties, and the note is the primary evidence of that debt.[5] The giving of a mortgage or other security for a subsisting debt does not extinguish or merge the personal liability. But of course it is competent for the parties to agree that the mortgagee shall look only to the security for his reimbursement, and that the debtor shall be absolved from all personal obligation.[6] Where a mortgage is made to secure a note, but contains a stipulation that "general execution shall not issue herein," the remedy is limited to the property alone.[7]

[1] Riblet *v.* Davis, 24 Ohio St. 114.

[2] Ely *v.* Ely, 6 Gray (Mass.), 439. See § 904.

[3] Fairman *v.* Farmer, 4 Ind. 436.

[4] Rudge *v.* Richens, L. R. 8 C. P. 358. A plea to this effect was struck out as bad and dishonest.

[5] Lichty *v.* McMartin, 11 Kans. 565; Vansant *v.* Allmon, 23 Ill. 30; Conn. Mut. L. Ins. Co. *v.* Jones, 1 McCrary, 388; Frank *v.* Pickle, 2 Wash. T. 55.

[6] Ball *v.* Wyeth, 99 Mass. 338.

[7] Kennion *v.* Kelsey, 10 Iowa, 443.

Even a surety of a note of his principal secured by a mortgage of land of the principal has no right to demand that the holder of the note shall first exhaust the security before maintaining an action on the note against the surety.[1]

That the equity of redemption has been sold on execution for other indebtedness does not deprive the mortgagee of his right to sue the mortgagor on the mortgage note. The purchaser at such execution sale does not become liable to the mortgagor for the mortgage debt, and the mortgagor is not by such purchase released from it either at law or in equity.[2]

The general rule is also in some states changed by statute. Thus, in California, Minnesota Nebraska, and Nevada, an action cannot be maintained on a promissory note secured by a mortgage, until the mortgage security is exhausted.[3] If, in consequence of the illegality of the sale, the property brings less than its value, this is a defence to an action for the balance due on the note.[4]

1221. The holder of the mortgage need not wait to ascertain the amount of the deficiency by a sale under the power, or even that there will be a deficiency, before proceeding to enforce the personal liability of the mortgagor on the note or other debt. He may in the first place sue on the note or any instalment of it, if due, and attach other property of the mortgagor, and afterwards proceed to sell under the power contained in the mortgage, if the debt be not satisfied.[5] Of course this right must yield to a special agreement of the parties that the personal liability shall not be enforced until the remedy upon the property is first exhausted.

1222. Neither is the pendency of a suit to foreclose the mortgage any bar to an action at law to recover the debt secured by it.[6] If a bill of foreclosure be dismissed on the merits, this is no bar to a suit on the note, for the debt may be due although the land is not bound.[7] Neither is a judgment against the validity of the mortgage necessarily a bar to a suit upon the note.[8] The mortgage debt may be valid although the mortgage

[1] Allen *v.* Woodard, 125 Mass. 400.

[2] Rogers *v* Meyers, 68 Ill. 92.

[3] Bartlett *v.* Cottle, 63 Cal. 366; Clapp *v.* Maxwell, 13 Neb. 542; Johnson *v.* Lewis, 13 Minn. 364; Weil *v.* Howard, 4 Nev. 384; Hyman *v.* Kelly, 1 Nev. 179. And see § 1223.

[4] Lowell *v.* North, 4 Minn. 32.

[5] Conn. Mut. L. Ins. Co. *v.* Jones, 1 McCrary, 388.

[6] Copperthwait *v.* Dummer, 18 N. J. L. (3 Harr.) 258.

[7] Longworth *v.* Flagg, 10 Ohio, 300.

[8] Lander *v.* Arno, 65 Me. 26.

itself be illegal and void.[1] The suit at law may be before, at the time of, or after the suit in equity.[2]

1223. By statute in some states no proceedings at law can be had for the recovery of the debt after the filing of a bill for foreclosure unless authorized by the court; and if proceedings at law are already pending when the bill is filed, although they need not be actually discontinued they must be suspended, unless the authority of the court be obtained to prosecute the suit.[3] This provision limits the prosecution of a suit at law not only against the mortgagor, but against one who has assumed the mortgage debt.[4] Under the statutes of these states, an equitable suit for foreclosure affords complete remedy against all persons liable for the debt, and at the same time for the recovery of a judgment for any deficiency there may be after the sale, and therefore there is no occasion for a suit at law; and to prevent a multiplicity of suits, the court in which the foreclosure suit is pending is given complete control over all the remedies for the collection of the debt, even after all the relief asked for in that suit is exhausted. An application to prosecute a suit at law is addressed to the sound discretion of the court.[5] Leave to prosecute should not be granted *ex parte* when the defendant is within reach.[6] Such leave may be granted after the action has been commenced.[7] If persons against whom a judgment for deficiency might have been had in the foreclosure suit have not been made parties to it, a subsequent action at law might properly be refused.[8] If no

[1] Shaver *v.* Bear River & Auburn Water Mining Co. 10 Cal. 396.

[2] Downing *v.* Palmateer, 1 Mon. (Ky.) 64, 68.

[3] It is provided by statute that the mortgagee shall not at the same time pursue his remedy against the property and against the person — in **Dakota Territory**: R. C. 1877, p. 616. **Indiana**: Revision 1876, vol. 2, 259. **Michigan**: Unless authorized by court. Compiled Laws 1871, p. 1549. **Nebraska**: Unless authorized. G. S. 1873, p. 656. **New York**: Unless authorized. 3 R. S. 1775, p. 198. **Washington Territory**: Laws 1859, p. 405. In **Iowa**, if a suit at law on the debt and a suit in equity on the mortgage be brought at the same time in the same county, the plaintiff must elect upon which he will proceed, and the other will be continued at his cost. Code 1873, § 3320.

The proper way to take advantage of the pendency of a foreclosure suit is to move for a stay of the legal proceedings. Goodrich *v.* White, 39 Mich. 489.

[4] See § **1721**; Pattison *v.* Powers, 4 Paige (N. Y.), 549; Scofield *v.* Doscher, 72 N. Y. 491. See, in connection, Comstock *v.* Drohan, 71 N. Y. 9; Campbell *v.* Smith, 71 N. Y. 26; and comments in 19 Alb. L. J. 383.

[5] Equitable Life Ins. Co. *v.* Stevens, 63 N. Y. 341; *S. C.* 1 N. Y. Weekly Dig. 465; 63 N. Y. 341; Scofield *v.* Doscher, *supra.*

[6] Goodrich *v.* White, *supra.*

[7] Earl *v.* David, 21 Hun (N. Y.), 527.

[8] Suydam *v.* Bartle, 9 Paige (N. Y.),

judgment for a deficiency is asked for, a satisfactory reason for a separate suit must be shown.[1] The fact that a person liable for the debt was not within the jurisdiction of the court when the foreclosure suit was commenced would doubtless be sufficient reason for allowing a separate suit against him for a deficiency.[2]

When a suit at law is pending at the time of commencing the foreclosure suit, and there are advantages in testing in that action the validity of a defence, the court will permit its prosecution,[3] and it will be allowed to proceed when it is necessary in this way to protect the plaintiff's rights.[4] A new suit after the commencement of the foreclosure suit would not generally be permitted until the remedy upon the decree obtained has been exhausted.[5]

In the same states if a judgment at law has already been obtained before the filing of the bill to foreclose, no proceedings can be had upon this until the remedy upon the judgment has been exhausted.[6] A bill which shows that judgment has been obtained on one of the mortgage notes and nearly paid, but does not show that an execution had been issued and returned unsatisfied, cannot be maintained unless a decree as to that note be waived.[7] The court would not make a decree against a defendant when it appears that the execution has not been returned unsatisfied, although he has allowed it to be taken as confessed against him.[8] On the other hand, after a decree has been entered in a foreclosure suit, proceedings at law to recover the debt are prohibited unless leave of court be obtained.[9]

1224. A decree of foreclosure before sale is no bar to a suit upon the mortgage debt while the decree is under the control of the court rendering it, for the decree or the sale under it may be set aside. Of course an action so commenced may be defeated by the subsequent sale of the property and satisfaction of the debt from the proceeds. Until that happens the debt re-

294; Comstock *v.* Drohan, 8 Hun (N. Y.), 373; Campbell *v.* Smith, 71 N. Y. 26.

[1] Equitable Life Ins. Co. *v.* Stevens, 63 N. Y. 341.

[2] Bartlett *v.* McNeil, 60 N. Y. 53.

[3] Suydam *v.* Bartle, 9 Paige (N. Y.), 294; Comstock *v.* Drohan, 8 Hun (N. Y.), 373; *S. C.* 71 N. Y. 9.

[4] Thomas *v.* Brown, 9 Paige (N. Y.), 370; and see Engle *v.* Underhill, 3 Edw. (N. Y.) 249.

[5] Nichols *v.* Smith, 42 Barb. (N. Y.) 381; Scofield *v.* Doscher, 72 N. Y. 491.

[6] See Shufelt *v.* Shufelt, 9 Paige (N. Y.), 137; North River Bank *v.* Rogers, 8 Ib. 648.

[7] Dennis *v.* Hemingway, Walker (Mich.) Ch. 387.

[8] Grosvenor *v.* Day, Clark (N. Y.), 109; Shufelt *v.* Shufelt, *supra.*

[9] In **New York**: 2 R. S. 191, § 155.

mains precisely the same; and if there be no sale, or the sale be set aside, the action may be prosecuted to judgment.[1] Until the sale is consummated there is no absolute satisfaction. When the sale is complete it relates back to the day of sale, and any proceedings then pending upon the note or other debt are then defeated.[2]

1225. Express covenant to pay. — The form of mortgage used in England almost always contains an express covenant to repay the money, and frequently no note or bond is used in connection with the mortgage. The loan is then a specialty debt, and the mortgagee has a personal remedy by action upon the covenant.[3] This covenant is extended also to the payment of interest. When the mortgage is executed by a trustee, it is usual for the equitable owner to execute the personal covenants, so that the trustee may incur no personal liability.[4] This personal remedy upon the covenant the mortgagee may enforce at the same time that he proceeds with his remedy against the land by a foreclosure suit, or by sale under the power; or he may use the personal covenant, after he has realized what he can from the land, for the deficiency.[5]

Although there be no note or bond or other distinct obligation which the mortgage secures, yet if the mortgage itself contain an express covenant for the payment of a sum of money, the mortgagor thereby becomes liable to a personal action for the debt;[6] unless the covenant implies that there is no personal liability, as in the case of a trustee covenanting for the repayment out of the money that may come into his hands from the mortgaged property, or from money that he may otherwise receive in such official capacity.[7]

If there be no personal obligation and no personal covenant in the mortgage, then the only remedy is against the property mortgaged.[8] The proviso or condition in a mortgage that the deed shall be void if the mortgagor pay a sum of money, or perform

[1] Morgan *v.* Sherwood, 53 Ill. 171. See § 950.

[2] Morgan *v.* Sherwood, *supra.*

[3] See §§ 72, 678; Mathew *v.* Blackmore, 1 H. & N. 762; *S. C.* 26 L. J. Ex. 150; Browne *v.* Price, 4 C. B. N. S. 598; *S. C.* L. J. C. P. 290; Frank *v.* Pickle, 2 Wash. T. 55.

[4] 1 Prideaux Conv. 570, 7th ed.

[5] Brown *v.* Cascaden, 43 Iowa, 103.

[6] Elder *v.* Rouse, 15 Wend. (N. Y.) 218.

[7] Mathew *v.* Blackmore, *supra.*

[8] Culver *v.* Sisson, 3 N. Y. 264; Weed *v.* Covill, 14 Barb. (N. Y.) 242; Coleman *v.* Van Rensselaer, 44 How. (N. Y.) Pr. 368; Gaylord *v.* Knapp, 15 Hun (N. Y.), 87; Spencer *v.* Spencer, 95 N. Y. 353; Halderman *v.* Woodward, 22 Kans. 734; Weil *v.* Churchman, 52 Iowa, 253. So by statute in Indiana: Acts 1881, § 713 of Civil Code.

some other act, is no ground for a personal action ;[1] and neither is a mere acknowledgment or recital of the debt without an express covenant to pay.[2] It has been held, however, that the mortgagee may recover against the mortgagor upon proof of his parol agreement to pay the mortgage debt.[3]

A covenant for the payment of the debt may be implied from a stipulation for payment on a certain day ; or from an admission of liability for the payment of it.[4] When the debt is not evidenced by a note, but the mortgage contains a recital that the mortgagor is "justly indebted" in a certain sum, the mortgagee may maintain an action upon the debt without first foreclosing the mortgage, although the mortgage contains the further covenant that if, from any cause, said property should fail to satisfy the debt, the mortgagor will pay the deficiency.[5]

1226. Circumstances that exclude personal remedy. — The holder of a mortgage may be debarred from resorting to the personal liability of the mortgagor by reason of equities or agreements between the parties of which the holder has knowledge; as when the owner of land having mortgaged it subsequently sold the equity of redemption by a deed which stipulated that the grantee should assume and pay the mortgage, and took back a second mortgage to himself reciting this stipulation. The assignee of the second mortgage, who also took an assignment of the first mortgage, was not allowed to sue the first mortgage note.[6]

A mortgagee may lose his right to sue the mortgagor for the debt by releasing the security to a subsequent purchaser of the property. Such was the case when a mortgagee concurred with a purchaser of the equity of redemption in a sale of the property, and allowed the purchaser to receive the purchase money ; he was not allowed afterwards to sue the original mortgagor for the debt.[7] When the mortgagor, with the knowledge of the mortgagee, sells the mortgaged estate to one who assumes the payment of the mortgage debt, his relation to the mortgagee is

[1] Smith *v.* Stewart, 6 Blackf. (Ind.) 162 ; Drummond *v.* Richards, 2 Munf. (Va.) 337.

[2] Scott *v.* Fields, 7 Watts (Pa.), 360 ; Fidelity Ins. & Trust Co. *v.* Miller, 89 Pa. St. 26.

[3] Tonkin *v.* Baum (Pa.), 7 Atl. Rep. 185.

[4] Hart *v.* Eastern Union Railway Co. 7 Exch. 246 ; *S. C.* 8 Ib. 116 ; Marryat *v.* Marryatt, 28 Beav. 224 ; Saunders *v.* Milsome, L. R. 2 Eq. 573. But it is provided by statute in several states that no covenant for payment shall be implied. § **678**.

[5] Newbury *v.* Rutter, 38 Iowa, 119.

[6] Swett *v.* Sherman, 109 Mass. 231.

[7] Palmer *v.* Hendrie, 28 Beav. 341 ; *S. C.* 27 Beav. 349.

thenceforth that of a surety of the mortgage debt. The property is moreover the primary fund for the payment of the debt, and a release to the purchaser, or an extension of the time of payment, may discharge the mortgagor.[1]

When a mortgage is made to secure the debt of another, and it does not by its terms or otherwise impose any personal liability upon the mortgagor, he is not personally bound for the debt, and there can be no general execution against him.[2]

No personal judgment can be rendered against the wife of the mortgagor, when it is not alleged that the debt is one for which her separate estate is liable.[3]

III. *Personal Remedy after Foreclosure.*

1227. Suit for deficiency after a sale under power. — If an action at law on the debt be pending at the time of a sale under the mortgage, there can be no judgment if the proceeds of the sale equal or exceed the whole mortgage debt; but if the proceeds be insufficient to pay the debt, there may be judgment for the balance after deducting the proceeds of sale.[4] Where suit is brought upon certain instalments of a note, and subsequently the mortgaged property is sold for a less sum than the whole mortgage debt, the mortgagee is not obliged to apply the proceeds of the sale to the payment of the instalments first due, and sought to be recovered in the action at law. He has the right to appropriate the amount so received to the payment of either instalment.[5] The holder of the mortgage being entitled to recover the full amount of the mortgage debt, if there be a deficiency after foreclosure of the mortgage, either by suit or under a power of sale, he may maintain an action on the debt for what remains due;[6] and a judgment for the deficiency does not open the sale and authorize the debtor to redeem.[7] A sale under a power bars the equity of redemption as effectually as does a foreclosure and sale by decree of court.

1228. Suit at law may be maintained for a deficiency after a sale under a decree in equity, if the plaintiff has not taken a

[1] §§ 740–742.

[2] Chittenden *v.* Gossage, 18 Iowa, 157. Deland *v.* Mershon, 7 Iowa, 70, was a case in which one of the mortgagors was personally liable. New Orleans Canal & Banking Co. *v.* Hagan, 1 La. Ann. 62.

[3] McGlaughlin *v.* O'Rourke, 12 Iowa, 459.

[4] See §§ 950–953, and chapter XL.; Wing *v.* Hayford, 124 Mass. 249.

[5] Draper *v.* Mann, 117 Mass. 439.

[6] Marston *v.* Marston, 45 Me. 412.

[7] Weld *v.* Rees, 48 Ill. 429.

judgment in the foreclosure suit for any deficiency there may be after the sale of the property.[1] The foreclosure operates as a payment of the debt to the amount received from the sale, or to the value of the property in case of a foreclosure without sale.[2]

If the mortgage provides that the whole debt shall become due upon default in the payment of any instalment of principal or interest, a suit at law may be maintained for the balance due upon the mortgage note after foreclosure, though the note by its terms be not due.[3]

Where a sale of the whole of the mortgaged premises is made in satisfaction of the first instalment of the mortgage, the usual clause of the decree, allowing the plaintiff to apply for a further order of sale upon the falling due of the subsequent instalment, and for an execution for any deficiency, becomes inoperative, and is no bar to a personal action against the mortgagor for the subsequent instalment. After the sale of all the property, the only remedy remaining is the enforcing of the personal liability of the mortgagor upon a note or instalment of debt subsequently falling due, and there could be no further order of sale, and therefore nothing on which there could properly be a further decree. The only remedy is by suit at common law.[4] This cannot be maintained until the debt is due and payable by its terms.[5]

IV. *Sale of Mortgaged Premises on Execution for Mortgage Debt.*

1229. Generally a mortgagee cannot, upon a judgment recovered for the debt secured by a mortgage, levy the execution upon the mortgaged property, though it may be levied upon any other property of the debtor.[6] Such a proceeding would amount

[1] See chapter XXXVIII.; Omaly *v.* Swan, 3 Mason 474; Globe Ins. Co. *v.* Lansing, 5 Cow. (N. Y.) 380; Lansing *v.* Goelet, 9 Ib. 346; Porter *v.* Pillsbury, 36 Me. 278; Stevens *v.* Dufour, 1 Blackf. (Ind.) 387; Watson *v.* Hawkins, 60 Mo. 550.

[2] § **953**; Johnson *v.* Candage, 31 Me. 28; Hunt *v.* Stiles, 10 N. H. 466; Bassett *v.* Mason, 18 Conn. 131; Duval *v.* McLoskey, 1 Ala. 708.

[3] Gregory *v.* Marks, 8 Biss. 44.

[4] Bliss *v.* Weil, 14 Wis. 35.

[5] Danforth *v.* Coleman, 23 Wis. 528.

[6] Hill *v.* Smith, 2 McLean, 446. **Massachusetts**: Atkins *v.* Sawyer, 1 Pick. 351; Washburn *v.* Goodwin, 17 Pick. 137. **New York**: Tice *v.* Annin, 2 Johns. Ch. 125, 130, per Kent, C.; Delaplaine *v.* Hitchcock, 6 Hill, 14; Trimm *v.* Marsh, 3 Lans. 509. **Mississippi**: Carpenter *v.* Bowen, 42 Miss. 28; Davis *v.* Hamilton, 50 Miss. 213. **Indiana**: Linville *v.* Bell, 47 Ind. 547. **North Carolina**: Camp *v.* Coxe, 1 Dev. & Bat. L. 52. **Kentucky**: Goring *v.* Shreve, 7 Dana, 64; Waller *v.* Tate, 4 B. Mon. 529. **Alabama**: Powell *v.* Williams, 14 Ala. 476, Boswell *v.* Carlisle, 55 Ala. 554; Barker *v.* Bell, 37 Ala. 354. **Missouri**: Young *v.* Ruth, 55 Mo. 515. Now so provided by statute in **North Carolina**: Code of Remedial Justice 1876, § 1432. By statute no part of the mort-

to a foreclosure in a way not contemplated by the parties or provided for by law. The levy would therefore be ineffectual, and would leave the mortgage as it stood before,[1] subject to redemption.[2] The mortgagee is just where he began.[3]

A first mortgagee may sue his mortgage debt and levy execution upon the mortgagor's right to redeem a second mortgage of the same land; for in such case he does not violate the contract contained in, and the relations created by, the mortgage deed.[4] And for the same reason the indorsee of one of two notes secured by mortgage, to whom no assignment of the mortgage has been made, may levy upon the equity of redemption to satisfy a judgment recovered by him on the note.[5]

Doubts have even been expressed whether a mortgagee could sell under execution for any other debt due him.[6] But these doubts were not well founded; for upon such a sale the sum bid is the value of the land above the mortgage debt, just as it is in case of a sale made upon an execution obtained by a third person. If a stranger purchases at such sale, the relations of the mortgagor and mortgagee are not disturbed any more than they are when the sale is upon an execution obtained by a stranger. And if the mortgagee purchases, the effect is equally in the one case as in the other to extinguish the mortgage debt.[7]

In some states, however, it is held that the mortgaged property may be sold under an execution issued upon a judgment for the mortgage debt.[8] In such case not merely the equity of redemption is sold but the entire mortgaged estate, so that the purchaser takes the premises free of the mortgage.[9] Such sale is of course a waiver of the mortgage, which cannot afterwards be foreclosed; or it may be regarded as operating as a foreclosure, with the same rights of redemption in the debtor and his creditors as arise upon

gaged premises can be sold by virtue of an execution for the mortgage debt in **New York**: Code Civil Procedure 1877, § 1432; in **Indiana**: Revision 1876, vol. 2, p. 265, § 640 of Code.

[1] Young *v.* Ruth, 55 Mo. 515; Lumley *v.* Robinson, 26 Mo. 364.

[2] Powell *v.* Williams, 14 Ala. 476; Boswell *v.* Carlisle, 55 Ala. 554.

[3] Thornton *v.* Pigg, 24 Mo. 249.

[4] Johnson *v.* Stevens, 7 Cush. (Mass.) 431.

[5] Crane *v.* March, 4 Pick. (Mass.) 131; Andrews *v.* Fiske, 101 Mass. 422.

[6] Camp *v.* Coxe, 1 Dev. & Bat. (N. C. L.) 52; Thompson *v.* Parker, 2 Jones Eq. (N. C.) 475.

[7] Per Rodman, J., in Barnes *v.* Brown, 71 N. C. 507, 510.

[8] Cottingham *v.* Springer, 88 Ill. 90; Fitch *v.* Pinckard, 4 Scam. (Ill.) 69.

[9] Youse *v.* M'Creary, 2 Blackf. (Ind.) 243; Freeby *v.* Tupper, 15 Ohio, 467; Hollister *v.* Dillon, 4 Ohio St. 197.

a sale under a decree of foreclosure.[1] If, instead of a sale, the mortgagee levy his execution on the land mortgaged for the same debt, and if the debtor neglect to redeem, the estate becomes absolute in the mortgagee notwithstanding the mortgage.[2] A mortgagee may waive his lien on the real estate and levy an execution issued upon a judgment recovered on his mortgage debt upon the same property, just as he might upon any other property of his debtor.[3]

If upon such execution sale the mortgagee himself finally purchases the property, and afterwards seeks to levy his execution upon other land of the mortgagor in order to make up a deficiency, the mortgagor is not, *ipso facto*, entitled to an injunction to restrain him from selling such other land, on the ground that the purchase of the equity of redemption extinguished the debt, but the mortgagor may have the sale enjoined until it shall have been determined whether the mortgage debt has been paid, and how much still remains to be satisfied.[4]

In those states in which it is provided by statute that executions shall be levied upon real estate by sale only when the property is subject to mortgage, it may well be that a mortgagee cannot levy his execution by sale of the equity raised by his own mortgage given to secure payment of the same debt; for he cannot waive his security and at the same time treat it as still subsisting and constituting the foundation of an equity. But the holder of a junior mortgage may in such case sell his debtor's equity growing out of a prior mortgage.[5]

1230. But an execution for the mortgage debt may be levied upon any other land of the debtor, or upon his personal property, in the same manner as any other debt.[6]

Other property of the debtor may be attached in a suit at law upon the mortgage debt, or a bill in equity may be maintained to reach and apply in payment of such debt property of the debtor which cannot be come at to be attached or taken on execution.[7]

After a redemption from a mortgage sale, a judgment for the

[1] Cottingham *v.* Springer, 88 Ill. 90; Sharts *v.* Awalt, 73 Ind. 304.

[2] Crooker *v.* Frazier, 52 Me. 405; Porter *v.* King, 1 Me. 297.

[3] Lord *v.* Crowell, 75 Me. 399.

[4] Lydecker *v.* Bogert, 38 N. J. Eq. 136.

[5] Forsyth *v.* Rowell, 59 Me. 131.

[6] § **665**; Roosevelt *v.* Carpenter, 28 Barb. (N. Y.) 426; Simmons Hardware Co. *v.* Brokaw, 7 Neb. 405. So by statute in **Indiana**: Acts 1881, p. 366, § 722 of Civ. Code.

[7] Tucker *v.* McDonald, 105 Mass. 423.

deficiency may be levied upon the same property, although the debtor has other property subject to execution.[1]

V. *Remedy as affected by Bankruptcy.*

1231. Although a discharge in bankruptcy will prevent a judgment for a deficiency on the note or debt, it will not prevent a judgment of foreclosure.[2] Neither will the foreclosure suit be continued to await a discharge in bankruptcy, because the discharge, if had, will not affect the mortgage lien.[3] The lien of the mortgage is not affected by the proceedings. The assignee takes the property subject to all the legal and equitable rights of the mortgagee and of others.[4] The assignee takes only the rights that the debtor himself had, and must recognize all the equities of other parties which the debtor would be held to recognize in a court of equity. Thus an agreement by the debtor to give a mortgage may be treated as a specific lien upon the land, and a mortgage made in pursuance of the agreement, although made just previous to the debtor's bankruptcy, so that by itself it would be open to objection as a fraudulent preference, by reference to the agreement, may be sustained as a valid security.[5] And so a mortgage given a short time prior to the mortgagor's bankruptcy, but in renewal of a security which was not a preference under the bankrupt act, is not open to that objection.[6] Adjudication alone does not divest the bankrupt's title, but this remains in him until the appointment of an assignee. Therefore, where one was adjudged a bankrupt, but no assignee was appointed, and no further proceedings had, for the reason that the debtor compromised with his creditors, giving notes secured by a mortgage, it was held that, when a year afterwards he again became involved and an assignee was appointed, the mortgage was valid and might be foreclosed.[7]

Inasmuch as a mortgage taken by a surety enures to the benefit of the principal creditor, the surety may assign the mortgage to such creditor, and the subsequent discharge of both the surety and the principal debtor does not destroy the lien of the mort-

[1] Cauthorn *v.* Indianapolis & Vincennes R. R. Co. 58 Ind. 14.

[2] See § **1438**; Roberts *v.* Wood, 38 Wis. 60; Brown *v.* Hoover, 77 N. C. 40; Oliphint *v.* Eckerley, 36 Ark. 69.

[3] Toler *v.* Passmore, 62 Ga. 263.

[4] Gibson *v.* Warden, 14 Wall. 244.

[5] Hewitt *v.* Northup, 9 Hun (N. Y.), 543; Burdick *v.* Jackson, 15 N. Bank. R. 318.

[6] Burnhisel *v.* Firman, 22 Wall. 170.

[7] Robinson *v.* Hall, 8 Benedict, 61.

gage, or affect the mortgagee's right to foreclose it.[1] But even without such an assignment a court of bankruptcy will enforce the mortgage for the benefit of the creditor to whom the surety has become bound.[2]

If proceedings to foreclose are commenced after the mortgagor has filed his petition in bankruptcy, although no judgment can be had against him personally, a decree may be rendered against the property.[3]

After the assignee has taken actual possession of the mortgaged estate, the mortgagee cannot by an action of ejectment disturb his possession. The possession of the assignee is the possession of the court in bankruptcy, and if the mortgagee would enter he must first obtain permission of that court. If the mortgagee be already in possession, he cannot be disturbed by the assignee, except upon redemption of the mortgage. If the assignee, for the reason that the incumbrance is greater than the value of the property, does not assume possession of it, then the bankruptcy proceedings do not prevent the mortgagee from recovering possession of the property from a third person not connected with the assignee. No permission from the bankruptcy court is necessary to authorize the mortgagee in such case to maintain an action of ejectment.[4] Although all the property and rights of the bankrupt pass to the assignee by operation of law, and become vested in him as soon as he is appointed, he is not bound to take possession of all the property. If the property be so incumbered as to be of an onerous or unprofitable character, or if it is liable to become a burden rather than a profit to the estate, the assignee is not bound to take the property into possession, or to take measures to sell it;[5] but rather it is his duty not to do so. If he elects not to take the property, it remains in the bankrupt. If he does not elect to take possession of the property within a reasonable time, he is deemed to have elected to abandon it. The title of the bankrupt to the equity of redemption is good against all the world except the assignee, as the presumption is that the property was regarded as onerous, and that the assignee elected not to take it into possession.[6]

1232. In what court the mortgage lien may be enforced. —

[1] Carlisle *v.* Wilkins, 51 Ala. 371.

[2] *In re* Pierce, 2 Lowell, 343; *In re* Jaycox, 8 N. Bank. R. 241.

[3] Cockrill *v.* Johnson, 28 Ark. 193.

[4] Eyster *v.* Gaff, 2 Colo. 228.

[5] McHenry *v.* La Société Française, 95 U. S. 58.

[6] Amory *v.* Lawrence, 3 Cliff. 523.

Although it is now generally held that the state courts may, with the assent of the assignee, be employed not only to ascertain the amount of a mortgage lien, but to enforce it as well, it was formerly held that the only proper tribunal for these purposes was the district court in bankruptcy; and that if the creditor remained outside this court, he did so at the risk of being refused the right to enforce his lien in the state court.[1] The commencement of proceedings in bankruptcy at once gives to the court of bankruptcy full and exclusive jurisdiction over all the bankrupt's property, and it retains this jurisdiction so long as the proceedings in bankruptcy are pending. It matters not that these proceedings are in a district and state other than that where the property is situated; the courts of the state where the property is do not thereby acquire any rights over it.[2]

Therefore if proceedings to foreclose a mortgage are instituted in a state court after an adjudication of bankruptcy, they will, upon motion, be stayed until these proceedings are closed.[3] The bankruptcy court may order the assignee to sell the property subject to the mortgage, and thus leave the mortgage to be enforced against the property in the hands of the purchaser. After such sale it would seem that proceedings to foreclose would be no longer stayed. But on the other hand, the court sitting in bankruptcy may authorize the assignee to redeem the mortgage; or may order the entire property to be sold free from the mortgage lien, and that the proceeds be paid into court, in which case the validity of the mortgage is there investigated in determining the distribution of the proceeds, and the purchaser takes the estate discharged of the mortgage.[4]

The state courts, however, have *primâ facie* jurisdiction to foreclose mortgages, although the suits for the purpose are commenced after the adjudication in bankruptcy.[5] The provisions of the

[1] Blum *v.* Ellis, 73 N. C. 293. Judge Settle, in this case, said: "Indeed, when we behold the obscurity in which this subject has been involved by the conflicting decisions of different courts, we are inclined to think that it would have been better had Congress withheld entirely from state tribunals all questions touching the bankrupt, his creditors, and his assets."

[2] Markson *v.* Haney, 47 Ind. 31.

[3] Levy *v.* Haake, 53 Ala. 267.

[4] Markson *v.* Haney, *supra;* Newman *v.* Fisher, 37 Md. 259; Brigham *v.* Claflin, 31 Wis. 607; Voorhies *v.* Frisbie, 25 Mich. 476. In like manner bankruptcy stays proceedings in a state court to enforce a mechanic's lien; Clifton *v.* Foster, 103 Mass. 233; or to set aside a fraudulent conveyance. Gilbert *v.* Priest, 65 Barb. (N. Y.) 444, overruling *S. C.* 63 Barb. 329.

[5] Broach *v.* Powell (Ga.), 3 S. E. Rep. 763.

bankrupt law, that the property covered by a mortgage shall be sold in such manner as the bankruptcy court shall direct, are for the benefit and protection of the unsecured creditors represented by the assignee, and he may, for himself and them, waive such benefit, and permit the property to be sold in a suit in a state court.[1] If the assignee submits himself to the jurisdiction of a state court he is bound by its judgment.[2] The jurisdiction of the state courts of suits for the settlement of conflicting claims to property belonging to the estate of the bankrupt is not divested.[3] The mortgagee may, with leave of the bankruptcy court, institute foreclosure proceedings in the state court;[4] or the assignee may sue in a state court to collect the assets.[5] Objection that leave was not given by the bankruptcy court to file a bill of foreclosure will not be sustained if made a year and a half after the bill was filed, and when the party objecting had in the mean time appeared and answered, especially when the premises were at the time in the possession of a receiver appointed in a former suit in the same court.[6] The homestead of a bankrupt never comes within the jurisdiction of the bankruptcy court; and therefore a creditor having a lien upon that alone may enforce it by suit while the bankruptcy proceedings are pending, without obtaining leave of that court.[7]

The federal courts have exclusive jurisdiction "of all matters and proceedings in bankruptcy."[8] These matters include all things treated of or affected by the legislation upon the subject of bankruptcy. It is therefore held that a state court has no jurisdiction to cancel a mortgage valid under the laws of the state, upon the ground that it was made in contravention of the federal bankrupt law.[9]

1233. Proceedings in bankruptcy against the owner of the equity do not suspend a suit already commenced in a state court for the foreclosure of the mortgage, and unless restrained by injunction from the United States court in bankruptcy, the plaintiff may proceed to judgment and sale of the premises, and the purchaser acquires a good title against the parties, including

[1] Mays *v.* Fritton, 20 Wall. 414; *In re* Moller, 7 Benedict, 726.

[2] Mays *v.* Fritton, *supra.*

[3] Eyster *v.* Gaff, 91 U. S. 521, 525; Jerome *v.* McCarter, 94 U. S. 734.

[4] McHenry *v.* La Société Française, &c. 95 U. S. 58.

[5] Claflin *v.* Houseman, 93 U. S. 130.

[6] Jerome *v.* McCarter, *supra.*

[7] *In re* Sinnett, 4 Sawyer, 250.

[8] R. S. U. S. § 711.

[9] Brewster *v.* Dryden, 53 Iowa, 657; and see Hecht *v.* Springstead, 51 Iowa, 502.

any assignee who may afterwards be appointed.[1] Upon the principle that a decree of foreclosure is binding upon one who purchases the equity of redemption or acquires any interest in it pending the suit for foreclosure, it is held that an assignee in bankruptcy appointed pending such suit is barred by a decree against the mortgagor. The assignee stands as any other grantee of the mortgagor would stand who had acquired title after the commencement of the foreclosure suit.[2]

If the assignee in bankruptcy does not assume possession of an estate mortgaged by the bankrupt, proceedings to foreclose the mortgage whenever commenced may, by his tacit consent, go on in the state court.[3]

Upon the institution of proceedings in bankruptcy, and the appointment of an assignee, the bankrupt's property comes under the jurisdiction of the national courts, and the state courts can act no further in relation to it while such proceedings are pending, except with the consent of the bankruptcy court or of its officer, the assignee, in whom the property is vested by the assignment. A suit to foreclose a mortgage upon the bankrupt's property, if brought subsequently, should be brought in a court of the United States, sitting in bankruptcy, and the assignee should be made a party to it. This court may take the entire administration of the bankrupt's estate, and may ascertain and liquidate all liens thereon, and for this purpose may restrain the holder of a mortgage or other lien from proceeding in any suit to enforce such lien; and it is generally proper for the court to do so when the value of the property exceeds the amount secured by the lien, or when the amount or validity of the lien is in doubt.[4] A mortgagee or trustee under a deed of trust will, upon the application of the assignee, be enjoined from selling under a power of sale.[5] If the foreclosure suit is already pending in a state court at the time the bankruptcy proceedings are commenced, it may be allowed to proceed upon making the assignee a party to it. In the case of a voluntary assignment of the mortgaged property after the commencement of a suit to foreclose, it is not necessary to

[1] Lenihan *v.* Hamann, 55 N. Y. 652; *S. C.* 14 Abb. (N. S.) 274; McGready *v.* Harris, 54 Mo. 137. In the latter case there had been no adjudication prior to the sale.

[2] Eyster *v.* Gaff, 91 U. S. 521; Stout *v.* Lye, 103 U. S. 66; Sedgwick *v.* Grinnell, 9 Ben. 429.

[3] Hatcher *v.* Jones, 53 Ga. 208.

[4] *In re* Iron Mountain Co. of Lake Champlain, 9 Blatchf. 320; *In re* Sacchi, 10 Ib. 29.

[5] Dooley *v.* Va. F. Ins. Co. 2 Hughes, 482.

bring in the assignee as a party to the suit; but if the assignment is by operation of law, as in cases of bankruptcy or under the insolvent acts, the assignee should be made a party before further proceedings are had. If he is not made a party, the foreclosure is of no effect as to him, and his equity of redemption remains unimpaired.[1]

1234. If the bankruptcy proceedings are pending in a state other than that in which the mortgaged property is located, although the bankruptcy court may exercise extra-territorial jurisdiction in collecting the estate and adjusting the claims of creditors, yet matters affecting the real estate of the bankrupt are of a local character, and the rights of parties must be determined by the local courts. Therefore it is held that a suit to foreclose a mortgage on the bankrupt's property, situate in another state, may be commenced after he is adjudicated a bankrupt, and prosecuted in the state where the land is situated. The mortgagee is entitled to have a foreclosure of his mortgage, and as he cannot have any remedy in the District Court of the United States in which the bankruptcy proceedings are pending, he is allowed to proceed in the courts of the state where the lands are. The assignee is protected in his rights by being made a party.[2]

1235. The bankruptcy court may order a sale subject to the mortgage. As already observed, the bankruptcy court may allow the mortgagee to foreclose his mortgage in the usual way in a state court, or may take upon itself the duty of ascertaining and enforcing the lien by a sale of the mortgaged property. It may also have the mortgaged premises sold subject to the lien, and leave the mortgagee to proceed to a foreclosure against the purchaser; or it may direct a release of the mortgaged premises to the mortgagee in satisfaction of the debt.[3]

If the mortgagee goes into the bankruptcy court, that court must take possession of the mortgaged property and sell it; and in that case this court must determine the order of priority of different liens upon the property, and the rights of the mortgagor

[1] Sedgwick *v.* Cleveland, 7 Paige (N. Y.), 287, 290; Anon. 10 Ib. 20; Lowry *v.* Morrison, 11 Ib. 327; Deas *v.* Thorne, 3 Johns. (N. Y.) 544; Springer *v.* Vanderpool, 4 Edw. (N. Y.) 362; Burnham *v.* De Bevorse, 8 How. (N. Y.) Pr. 159; Winslow *v.* Clark, 47 N. Y. 261, 263; Russell *v.* Clark, 7 Cranch, 69; *In re* Wynne, 4 N. Bank. R. 23; Eyster *v.* Gaff, 2 Colo. 228, 239.

[2] Whitridge *v.* Taylor, 66 N. C. 273. In this case the assignee accepted service and was willing the case should proceed.

[3] *In re* Ellerhorst, 2 Sawyer, 219. And see Clifton *v.* Foster, 103 Mass. 233; Broach *v.* Powell (Ga.), 3 S. E. Rep. 763.

under any claims he may set up, as, for instance, his right to a homestead exemption. When the homestead of the debtor has been sold as a part of the mortgaged property, the court has jurisdiction to order the bankrupt to deliver possession to the purchaser upon the bankrupt's refusal to surrender the property to the purchaser.[1]

The District Court in bankruptcy has no jurisdiction of a summary petition by a mortgagee against the assignee to order a sale of the property when it appears that the title of the applicant[2] is in dispute, or that the estate is in the actual possession of a third person claiming title; as, for instance, when it is in the possession of receivers appointed by a state court.[3]

1236. If a mortgagee desires to prove his claim against the mortgagor's estate in bankruptcy, he may release his security to the assignee and prove for the whole of his claim; or he may have the property sold under direction of the bankruptcy court, and prove for any balance of his claim remaining unsatisfied; or he may instead have his security valued and prove for the balance after deducting the value of the property.[4] But the mortgagee need not take either of these courses. He may rest upon his security, in which case the discharge of the bankrupt mortgagor constitutes no defence to a subsequent action to foreclose the mortgage,[5] so far as the mortgaged property is concerned, but would be a bar to any personal judgment against the bankrupt.

The fact that the mortgagee has proved his claim in bankruptcy does not prevent his foreclosing his mortgage in a state court upon leave granted by the bankruptcy court.[6]

[1] *In re* Betts, 4 Dill. 93; *S. C.* 7 Reporter, 522.

[2] *In re* Casey, 10 Blatchf. 376.

[3] Bradley *v.* Healey, 1 Holmes, 451, and cases cited; Knight *v.* Cheney, 5 N. Bank. R. 305; and see Hayes *v.* Dickinson, 9 Hun (N. Y.), 277; Smith *v.* Mason, Wall. 419.

[4] Bankrupt Act, § 1075.

Although the United States Bankrupt Act has been repealed, the sections of this work relating to remedies upon mortgages as affected by that act have been retained in the present edition, not only because they are of use in determining rights under past proceedings, but because they still apply to unfinished proceedings under this act; and because, moreover, much of what has been said about remedies as affected by the Bankrupt Act is equally applicable to remedies as affected by the insolvent acts of the several states, under which there are very few reported decisions.

The proof of the debt as unsecured is not a waiver of a mortgage given to secure it by a person other than the bankrupt. National Bank *v.* Wood, 53 Vt. 491.

[5] Pierce *v.* Wilcox, 40 Ind. 70; Wicks *v.* Perkins, 1 Woods, 383; Price *v.* Amis, 58 Ga. 604.

[6] Société D'Epargnes *v.* McHenry, 49 Cal. 351.

In Illinois, where foreclosure may be had by *scire facias*, the recovery of a judgment in such suit is no defence to a bill in equity to foreclose the same mortgage.[1] The mortgagee may use both these remedies and all others as well, but of course can have but one satisfaction.

[1] Erickson *v.* Rafferty, 79 Ill. 209.

CHAPTER XXVIII.

FORECLOSURE BY ENTRY AND POSSESSION.

I. Nature of the remedy, 1237, 1238.
II. Statutory provisions, 1239–1245.
III. The entry, 1246–1257.
IV. The possession, 1258.
V. The certificate of witnesses, 1259, 1260.
VI. The certificate of the mortgagor, 1261.
VII. When the limitation commences, 1262.
VIII. Record of the certificate, 1263.
IX. Effect of the foreclosure upon the mortgage debt, 1264.
X. Waiver of entry and foreclosure, 1265.

I. *Nature of the Remedy.*

1237. Foreclosure by means of the mortgagee's entering upon the premises and holding them for a limited time seems to follow naturally from the principle established in equity, that after forfeiture of the condition, although the mortgagee may enter, yet the mortgagor shall be allowed within a reasonable time to redeem.[1] The entry serves to give notice to the mortgagor that his right of redemption will be lost unless he discharges the obligations of his deed. The mortgagee immediately receives the rents and profits, which, as part of his security, should go to him after the mortgagor's default. This default continuing, the property is applied to the discharge of the debt by becoming the absolute estate of the mortgagee. The length of possession generally required to perfect the mortgagee's title to the property makes the remedy a slow one for obtaining money in discharge of a mortgage debt. But the remedy is inexpensive, and is ready at hand to be applied by the mortgagee himself, while the mortgagor cannot complain that it is an oppressive one.

1238. Where used. — This mode of foreclosure is in use in Maine, New Hampshire, Massachusetts, and Rhode Island, and is the usual remedy in these states to secure the discharge of the mortgage out of the property, except in case of power of sale mortgages, which, by reason of the promptness of the remedy afforded by them, have of late come into very general use. The

[1] For the mode of obtaining possession by process of law, see §§ **1276–1316.**

statutory provisions of these states in respect to the entry and the evidence of possession, though similar, are in important details unlike, and therefore a brief statement will be made of these provisions; but the general rules governing the subject being of universal application will be stated under the general divisions of the following sections.

II. *Statutory Provisions.*

1239. In Maine[1] the mortgagee may obtain possession for the purpose of foreclosure, either by process of law or by entering peaceably and openly, if not opposed, in the presence of two witnesses, whose certificate of the fact and time of such entry, signed and sworn to by them before a justice of the peace, must be recorded in the registry of deeds where the mortgage should be recorded, within thirty days after the entry is made; entry may also be made with the consent in writing of the mortgagor or other owner, in which case such consent must be recorded in the same manner as the certificate of witnesses. Possession obtained in either of these modes and continued for the three following years forecloses the right of redemption.[2] The mortgagor and mortgagee may, however, in the mortgage agree upon a less time, but not less than one year, in which the mortgage shall be foreclosed.[3] The entry must be actual though made with consent.[4]

1240. Foreclosure by advertisement. — Another mode of foreclosure without entry, but based on the same principle of notice to the mortgagor, is provided for in Maine. The mortgagee gives public notice in a newspaper printed in the county where the premises are situated,[5] if any, or if not in the state paper, three weeks successively, of his claim by mortgage, describing the premises intelligibly,[6] naming the date of the mort-

[1] There can be no foreclosure in equity in this state. Although the Revised Statutes, ch. 96, in terms authorized the Supreme Court to take cognizance, as a court of equity, of "suits for the redemption and foreclosure of mortgaged estates," it was held that the specific provisions of the statute for the foreclosure of mortgages precluded any jurisdiction in equity, and that the language of the statute quoted as to foreclosure in equity was inadvertently used. Chase *v.* Palmer, 25 Me. 341.

[2] R. S. 1883, ch. 90, §§ 3–6.

[3] Acts 1872, ch. 37.

[4] Jones *v.* Bowler, 74 Me. 310.

[5] Welch *v.* Stearns, 74 Me. 71.

[6] The description should be sufficient to enable those interested in the premises to identify them with reasonable certainty. On this ground the following was held insufficient: "On the 22d day of June, 1850, Lewis Dela, of Portland, mortgaged to the undersigned certain property particularly described in the deed situated at the

gage, and stating that the condition of it is broken, by reason whereof he claims foreclosure;[1] a copy of this printed notice, with the name and date of the newspaper in which it was last published, is recorded in each registry of deeds in which the mortgage is or ought to be recorded, within thirty days after the last publication of it. Instead of such publication an attested copy of the notice may be served on the mortgagor or his assigns, if in the state, by the sheriff or his deputy, by delivering it to him in hand or leaving it at his place of last and usual abode; when the notice with the sheriff's return is recorded within thirty days after service. If the premises are not redeemed within three years, or within such time, not less than one year, as the parties have agreed upon, after the first publication, or after the service of the notice, the right of redemption is foreclosed.[2] Under this statute, notice by a mortgagee after he has assigned his mortgage is ineffectual.[3] It should then be given by the assignee. Notice by the assignee to be effectual must be given after his assignment has been recorded; if the notice be given before the assignment is recorded, and the person entitled to redeem has no actual notice of the assignment, the mortgage will not be foreclosed at the expiration of three years from the time of publication.[4] The mortgage without the record of the assignment is notice to the owner of the equity that the title is in the mortgagee, and he may act upon this assumption, and disregard all claims by other persons;[5] whether by a subsequent record of the assignment the foreclosure would be complete in three years from the time of record is questionable.[6] The notice must describe the premises so intelligibly that those entitled to redeem may know with reasonable certainty what premises are intended.[7] The publication of it is no bar to a subsequent writ of entry to foreclose the mortgage;[8] and it would seem to be no bar to an open and peaceable entry by the mortgagee for this purpose.

corner of Fore and India streets, in this city." Dela *v.* Stanwood, 61 Me. 51.

[1] A notice stating that "the condition had been broken, and now the mortgagees give notice of the same, and that they claim a foreclosure of said mortgage," is sufficient. It may be inferred, though not declared, that the foreclosure is claimed by reason of the breach of condition. Pearce *v.* Savage, 45 Me. 90.

[2] R. S. 1883, ch. 90, §§ 5, 6.

[3] Cushing *v.* Ayer, 25 Me. 383.

[4] Reed *v.* Elwell, 46 Me. 270.

[5] Mitchell *v.* Burnham, 44 Me. 286.

[6] Reed *v.* Elwell, *supra.*

[7] Chase *v.* McLellan, 49 Me. 375.

[8] Concord Union Mut. F. Ins. Co. *v.* Woodbury, 45 Me. 447; and see Stewart *v.* Davis, 63 Me. 539.

1241. In New Hampshire[1] a mortgage may be foreclosed by peaceable entry, and continued actual peaceable possession for the space of one year, and by publishing in some newspaper printed in the same county, if any there be, otherwise in some newspaper printed in some adjoining county, three weeks successively, a notice stating the time at which such possession for condition broken commenced, the object of the possession, the name of the mortgagor and mortgagee, the date of the mortgage, and a description of the premises, the first publication to be six months at least before such right to redeem would be foreclosed.

1242. A mortgagee already in possession of the mortgaged premises may publish in some newspaper printed in the same county, if any there be, otherwise in some newspaper printed in some adjoining county, three weeks successively, a notice stating that from and after a certain day, which shall be specified in the notice, and not more than four weeks from and after the last day of publication, such possession of the premises will be held for the purpose of foreclosing the right of the mortgagor and all persons claiming under him to redeem the same, for condition broken, — stating the name of the mortgagor and of the mortgagee, the date of the mortgage, and a description of the premises; and by retaining actual peaceable possession of the premises for one year from and after the day specified in the printed notice foreclosure will be effected.

The affidavit of the party making the entry, and of the witnesses to it, as to the time, manner, and purpose of said entry, and a copy of the published notice verified by affidavit as to the time, place, and mode of publication, recorded in the registry of deeds for the county in which the lands lie, are evidence of the entry and publication.[2]

1243. The provisions of the statute must be strictly followed in order to effect a change of title by foreclosure, and the proof that these provisions have been followed must be such as the statute makes competent. The affidavit of one witness to the entry,[3] without the affidavit of the party making the entry, is

[1] G. L. 1878, ch. 136, § 14. Entry may also be made by process of law, in which case no publication of notice is necessary, and foreclosure is complete after a continued actual possession for one year. G. L. 1878, ch. 736, § 14. Foreclosure may also be had by a bill in equity, which is the mode to be preferred when the matters between the parties are complicated. Aiken *v.* Gale, 37 N. H. 501, 510.

[2] G. S. 1867, ch. 122; G. L. 1878, ch. 136, §§ 14–16.

[3] Wendell *v.* Abbott, 43 N. H. 68; and see Storer *v.* Little, 41 Me. 69.

not evidence of the entry. When a copy of the published notice verified by affidavits, properly recorded, is introduced in evidence, it is not necessary to produce the original notice, or the papers in which it was published.[1] It is not necessary that knowledge of the published notice should be brought home to the party interested.[2] Even notice of the mortgagee's entry and possession, under the statute requiring publication of notice, is insufficient without publication.[3] The published notice must show that possession was taken for condition broken, and that the object of such possession is to foreclose the mortgage.[4] A mistake in the notice that the entry was for the purpose of foreclosing "the right in equity of the mortgagee" is fatal, as it is liable to mislead, and the statute must be strictly pursued.[5] The acknowledgment in writing by the mortgagor of the mortgagee's entry and possession is not evidence of actual possession or of a foreclosure, as against a stranger.[6]

1244. In Massachusetts[7] the mortgagee after breach of the condition may recover possession by action, or may make an open and peaceable entry on the mortgaged premises; and such possession continued peaceably for three years forever forecloses the right of redemption. To make such entry effectual, a certificate in proof thereof must be made on the mortgage deed and signed by the mortgagor or the person claiming under him; or a certificate of two competent witnesses to prove the entry must be made and sworn to before a justice of the peace; and such certificate must within thirty days after the entry be recorded.[8] Prior to the statute of 1785 any peaceable entry made by the mortgagee, by himself, without the presence of witnesses and without process of law, was sufficient, provided an actual entry was made for the

[1] Farrar *v.* Fessenden, 39 N. H. 268.

[2] Howard *v.* Handy, 35 N. H. 315, 323, 375.

[3] Ashuelot R. R. Co. *v.* Elliot, 52 N. H. 387; Deming *v.* Comings, 11 N. H. 474, 484.

[4] Green *v.* Davis, 44 N. H. 71. The notice merely stated that on August 5, 1856, the mortgagee took quiet possession of the premises, by entering on the same, and therefore claims a foreclosure of the mortgage for condition broken.

[5] Abbot *v.* Banfield, 43 N. H. 152, 155.

[6] Worster *v.* Great Falls Manuf. Co. 41 N. H. 16.

[7] The Supreme Judicial Court has jurisdiction in equity to foreclose mortgages. G. S. 1860, ch. 113, § 2; P. S. 1882, ch. 150, § 2. But this jurisdiction is limited to cases where there is not a plain, adequate, and complete remedy at the common law; and consequently foreclosure in equity can seldom be had. A mortgage of a railroad franchise, and property incidental to its exercise, is within the equity jurisdiction of the court, the remedy at law being inadequate. Shaw *v.* Norfolk Co. R. R. Co. 5 Gray, 162.

[8] G. S. 1860, ch. 140, §§ 1, 2; P. S. 1882, ch. 181, §§ 1, 2.

purpose of foreclosure,[1] followed by open and continued possession. The statute of 1785, and the subsequent one of 1798, made no provision for the recording of a certificate of entry, and it was necessary either that the mortgagor should have actual notice of the entry or that possession should be continued. The record of a memorandum of the entry availed nothing; actual notice only would supply the want of peaceable possession;[2] although an entry in the presence of witnesses was one of the prescribed modes of foreclosing, there was no provision made for taking or preserving the evidence. Under these statutes the fact of entry, which constituted the commencement of the time of foreclosure, could be proved by any competent evidence. The testimony of the witnesses of the entry to the fact and purpose of it was the proof ordinarily made.[3] Although no certificate by them was required, yet it was the common practice to take such a certificate, as a means of preserving the evidence, which, in the lapse of time, would be apt to pass out of the memory of the witnesses. Such certificate verified by the witnesses was competent evidence; and although they might not be able to recall the facts stated in the certificate, their testimony that they signed the certificate, and that they should not have put their names to it except to certify their knowledge of the facts stated, was held to be a sufficient verification.[4]

An entry by the mortgagee upon condition broken was presumed to be for the purpose of foreclosure, unless the contrary appeared;[5] but no such presumption followed an entry before condition broken,[6] and if the possession was commenced before condition broken and continued afterwards, either actual or constructive notice to the mortgagor of the purpose of the mortgagee to hold for a foreclosure was necessary, in order to constitute a commencement of the limitation of the right to redeem.[7] If the mortgagee entered under a lease or by other lawful means, and

[1] Whitney *v.* Guild, 11 Gray, 496; Newall *v.* Wright, 3 Mass. 138; Boyd *v.* Shaw, 14 Me. 58. Statute of 1785, ch. 22, § 2, provided that the mortgagor might redeem, "unless the mortgagee or person claiming under him hath, by process of law, or by open and peaceable entry made in the presence of two witnesses, taken actual possession thereof and continued that possession peaceably three years."

[2] Thayer *v.* Smith, 17 Mass. 429; Skinner *v.* Brewer, 4 Pick. 468.

[3] Gordon *v.* Lewis, 1 Sumn. 525.

[4] Crittenden *v.* Rogers, 8 Gray, 452; Smith *v.* Johns, 3 Gray, 517.

[5] Taylor *v.* Weld, 5 Mass. 109, 121; Hadley *v.* Houghton, 7 Pick. 29; Skinner *v.* Brewer, *supra.*

[6] Erskine *v.* Townsend, 2 Mass. 493; Pomeroy *v.* Winship, 12 Mass. 514.

[7] Scott *v.* McFarland, 13 Mass. 309.

afterwards undertook to hold as mortgagee for the purpose of foreclosure, it was held that he must give notice of his intention to the party entitled to redeem, in order that the latter might know when the limitation of his right to redeem began.[1]

The object of the open and peaceable entry, and of the continued possession under it, was to give the mortgagor such notice that he might know when commenced the limitation of the three years, beyond which his right of redemption would cease.

Notice to the mortgagor being the material thing, it was no objection, after an open and peaceable entry such as would necessarily give him actual notice had once been made, that the possession was not continued by the mortgagee personally. He might occupy by a tenant, and as his tenant the mortgagor might remain in possession.[2]

These decisions under the statutes in force before the Revised Statutes of 1836 introduced the system of giving notice of the entry by requiring a record of the certificate, though not directly applicable now, yet serve to illustrate the force and effect of the present law, which, being generally the same in the several states in which this mode of foreclosure prevails, will be stated under the appropriate divisions of the subject in subsequent sections.

1245. In Rhode Island[3] the right of redemption is barred unless payment of the debt and interest is made within three years next after the mortgagee or other person claiming under him, either by process of law,[4] or by peaceable and open entry made in the presence of two witnesses, has taken actual possession of the mortgaged estate, and continued the same during said term. When possession is taken in the presence of witnesses, they must give a certificate of such possession being taken ; and the person delivering possession must acknowledge before a justice of the peace within the town where the estate lies that the same was voluntarily done, which certificate and acknowledgment are recorded.[5]

The possession must be continued "during said term." It must be accompanied throughout by a right on the part of the mortgagor to redeem, and to maintain a bill for that purpose. But after the owner of the equity of redemption has surrendered

[1] Ayres *v.* Waite, 10 Cush. 72.

[2] Hadley *v.* Houghton, 7 Pick. 29.

[3] In this state foreclosure may be had also by a bill in equity. G. S. ch. 165, § 14.

[4] This is ejectment, or trespass and ejectment. See chapter XXIX.

[5] G. S. ch. 162, § 4 ; ch. 165, §§ 4, 5.

possession, an absolute conveyance by him to a third person of a portion of the premises is not such an interruption of possession as will prevent the completion of the foreclosure in three years from the entry.[1]

III. *The Entry.*

1246. In general. — As already stated, under the earlier laws open and visible entry in the presence of witnesses was solely for the purpose of giving notice to the mortgagor that his right of redeeming would be gone in three years. The entry, like a judgment, fixed the time from which the three years began to run, and at the same time gave notice of it. After the adoption of the system of certifying and recording the entry, the registration of the certificate became full constructive notice to all persons of the fact and date of the entry, of the cause and the purpose of it. The entry and possession under it thus became of much less consequence than the certificate, which, being properly made and recorded, effects the foreclosure.

1247. The entry should be made by the person holding the legal title to the mortgage or by his authorized agent. An entry made by an agent of the mortgagee without express authority may be subsequently ratified by him and made effectual. An entry made by an attorney or officer of a corporation without legal authority may be made the act of the corporation by express ratification, or by a recital of it in a subsequent agreement or deed executed by the corporation to the owner of the equity.[2] A person holding two mortgages upon the same land may enter under the first; his possession is under that only, and redemption may be had from that without redeeming from the second.[3]

1248. Upon the death of the mortgagee, the entry should be made by his executor or administrator.[4] His heirs at law cannot make an effectual entry, as the mortgage is personal assets and goes to the personal representative. The mortgagor's right to redeem remains unaffected by such an entry, unless possession under it be continued so long that the statute of limitations may be pleaded in favor of the right to redeem.[5] After the foreclosure is complete, the legal estate vests in the heirs, subject, like

[1] Daniels *v.* Mowry, 1 R. I. 151.

[2] Cutts *v.* York Manuf. Co. 18 Me. 190.

[3] Gerrish *v.* Black, 122 Mass. 76.

[4] Gibson *v.* Bailey, 9 N. H. 168; Fifield *v.* Sperry, 20 N. H. 338.

[5] Haskins *v.* Hawkes, 108 Mass. 379; Palmer *v.* Stevens, 11 Cush. 147; Fay *v.* Cheney, 14 Pick. 399, 404; Smith *v.* Dyer, 16 Mass. 18.

other real estate of the deceased, to be used for the purposes of administration; but until the title is thus made complete in the heirs, they can do nothing with the mortgage or with the premises covered by it.

Although a mortgagee cannot make an effectual entry after he has assigned all his interest in the mortgaged premises, even if he remains in possession,[1] yet after he has quitclaimed to a third person his interest in a portion of them, his entry is sufficient to foreclose the mortgage as to all the premises covered by it, even that portion in the possession of his grantee.[2]

1249. It is the mortgagee's right to foreclose the whole estate embraced in the mortgage; but where the owner of the equity has conveyed a part, there may be a possession and foreclosure of the part not conveyed, though nothing be done to foreclose the rest, and the mortgage will be paid to the extent of the value of the land taken.[3] A mortgagor, however, cannot under any circumstances, except with the consent of the holder of the mortgage, have a part of the mortgaged premises estimated in payment of his debt; and it would seem that without the mortgagor's consent there could be no foreclosure of a part of the premises, and that so long as he has a right to redeem any part he may redeem the whole.[4]

1250. Assignment of the entry. — An entry made by a holder of the mortgage enures to the benefit of any one to whom it may be assigned during the time limited for redemption. If after an entry the mortgage be assigned at the request of the mortgagor to a friend of his to hold for his benefit, the foreclosure is not postponed or prevented unless the mortgage be in fact paid. Where one at the request of the mortgagor, after the foreclosure had been running more than two years, paid the amount due and took an assignment of it, orally agreeing with the mortgagor to hold the mortgage subject to his claim for the amount paid, and to permit the mortgagor to sell the land in lots, paying over the proceeds, and to allow the mortgagor to redeem at any time by paying the amount so advanced with interest, it was held that the foreclosure was not stopped.[5] Even if a purchaser from a mortgagor, after an entry by the mortgagee, pays him the amount of

[1] Sisson *v.* Tate, 109 Mass. 330; Call *v.* Leisner, 23 Me. 25.

[2] Raymond *v.* Raymond, 7 Cush. 605; Colby *v.* Poor, 15 N. H. 198.

[3] Green *v.* Cross, 45 N. H. 574, 582.

[4] Spring *v.* Haines, 21 Me. 126; and see Treat *v.* Pierce, 53 Me. 71.

[5] Capen *v.* Richardson, 7 Gray, 364.

the mortgage and enters into possession, the foreclosure may still go on and be perfected under an agreement with the mortgagee that he should hold the mortgage and consummate the foreclosure.[1] Although one of the notes has been transferred to a third person, an entry by the holder of the mortgage is considered as made for that as well as for the note held by him, and will operate as payment of both, if the premises be of sufficient value;[2] if not of sufficient value, the notes, in the absence of any agreement to the contrary, would be paid *pro rata*. On completion of the foreclosure the mortgagee would hold a proportionate interest in the land in trust for the holder of the other note.

1251. A second mortgagee may enter and take possession for the purpose of foreclosure, as against all subsequent mortgages and the equity of redemption.[3] The second mortgagee may lose his estate, if he does not redeem it from the first mortgage: but as against every other title the foreclosure is as perfect as if the first mortgage did not exist. The entries under the two mortgages are not inconsistent. The second mortgagee holds a constructive possession, which is all that is required, and his certificate of entry is notice to all subsequent parties, and will bar their rights after such possession has continued for three years.[4]

A first mortgagee has the right to retain possession of the estate for the purpose of foreclosing against the original mortgagor and all persons claiming under him. But a second mortgagee has also a right to foreclose against the right to redeem from his mortgage, so that a foreclosure of both mortgages may be going on at the same time. If the first mortgagee, after having taken possession for the purpose of foreclosure, takes a third mortgage or a conveyance of the equity of redemption from the mortgagor, the second mortgagee is still entitled to such a judgment for possession of the mortgaged premises as will enable him to foreclose the right which the first mortgagee has of redeeming from the second mortgage, subject to the prior right of the first mortgagee to hold possession for the purpose of foreclosing his mortgage.[5]

A subsequent mortgagee has only an equity of redemption as to prior mortgagees. He may enter and take possession of the

[1] Cutts *v.* York Manuf. Co. 18 Me. 190.

[2] Haynes *v.* Wellington, 25 Me. 458.

[3] Lincoln *v.* Emerson, 108 Mass. 87.

[4] Palmer *v.* Fowley, 5 Gray, 545; and see Cavis *v.* McClary, 5 N. H. 529.

[5] Cronin *v.* Hazeltine, 3 Allen, 324: Doten *v.* Hair, 16 Gray, 149; Palmer *v.* Fowley, *supra;* George *v.* Baker, 3 Allen, 326.

mortgaged premises as against the mortgagor; but is himself liable to be ousted of his possession by the entry of a prior mortgagee. A first mortgagee after entry may authorize the mortgagor to occupy as his agent; but the death of the first mortgagee is a revocation of such authority, and the mortgagor cannot by virtue of his agency afterwards hold the premises against a second mortgagee.[1] A mortgagor who gives a second mortgage containing full covenants of warranty, and subsequently acquires title to the first mortgage after possession taken under it, cannot hold possession against the second mortgagee, because he is estopped by the covenants of warranty.[2]

1252. A married woman cannot enter to foreclose a mortgage of land, the equity of redemption of which is held by her husband. The statutes removing the disabilities of married women do not allow the adverse relation of debtor and creditor to exist between husband and wife. She could not maintain a writ of entry against her husband, and the process of foreclosure by entry and possession is equally adverse.[3] Her right to enforce a forfeiture of the land in this way revives so soon as a conveyance of it is made by her husband.

1253. The mortgagee may enter at any time after breach of the condition,[4] and he does not lose the right by bringing an action to foreclose; but he may take possession during the two months allowed to the mortgagor under the conditional judgment to pay the amount due.[5] If a writ of possession be subsequently issued upon such judgment, and possession delivered to the mortgagee by virtue of the writ, then the previous entry is waived by the entry under the writ.[6]

1254. An entry upon a part of the land mortgaged by one general description is sufficient,[7] and when several distinct and detached parcels in the same county are mortgaged in one deed for the performance of one condition, an entry upon any one is a good entry upon the whole.[8] Even if the mortgagor remains in pos-

[1] Lincoln *v.* Emerson, 108 Mass. 87.

[2] Lincoln *v.* Emerson, *supra.*

[3] Tucker *v.* Fenno, 110 Mass. 311.

[4] See chapter xxv.; Shepard *v.* Richardson (Mass.), 11 N. E. Rep. 738.

[5] Mann *v.* Earle, 4 Gray, 299.

[6] Fay *v.* Valentine, 5 Pick. 418; Fletcher *v.* Cary, 103 Mass. 475, 480.

[7] Lennon *v.* Porter, 5 Gray, 318; Spring *v.* Haines, 21 Me. 126; Colby *v.* Poor, 15 N. H. 198.

[8] Bennett *v.* Conant, 10 Cush. 163; Green *v.* Pettingill, 47 N. H. 375; Shapley *v.* Rangeley, 1 Wood. & M. 213. "If a man hath cause to enter into any lands or tenements in diverse townes in one same countie, if he enter into one porcell of lands or tenements which are in one towne, in the name of all the lands or

session of a part of the premises, and does various acts of ownership, such as blasting, quarrying, and carrying away stone, he does not defeat the entry and possession of the mortgagee. These acts are held to be done in subordination to the title of the mortgagee, whom the mortgagor cannot disseise.[1] The recording of the evidence of entry is notice to all persons of the relation the mortgagor holds to the property; and he is conclusively prevented from holding adversely to the mortgagee.

1255. In making the entry the mortgagee should have the mortgage deed with him, to enable the witnesses to certify that the entry is made under that particular mortgage; but if they certify that the entry is made under the mortgage, the certificate is conclusive of the identity of the mortgage, whether the witnesses have any proper knowledge of it or not.[2]

1256. An entry is peaceable if not opposed by the mortgagor or other person claiming the premises. If it be opposed, the mortgagee must resort to his action at law to recover possession. Though forcibly repelled he cannot resort to the process of forcible entry and detainer.[3] The remedies are confined to those specifically given by statute.

1257. The entry is sufficiently open if made in the presence of two competent witnessess, whose certificate is sworn to and duly recorded within thirty days in the registry of deeds for the county where the land lies.[4] Even though the entry be made in the night-time, and purposely in secret, it is sufficient if the certificate of the entry be duly sworn to and recorded.[5] No publicity need be given to the entry other than the record of it. Although the mortgagee be already in occupation of the premises, he may make an entry in the presence of witnesses, for the purpose of foreclosure, without giving other notice of it than recording the certificate. After a breach of the condition has given the mortgagee

tenements into which he hath right to enter within all the townes of the same countie; by such entrie he shall have as good a possession and seizin of all the lands and tenements whereof he hath title of entrie, as if he had entered indeed into every porcell." Litt. Sec. 417. "If the lands lie in several counties," says Coke, "there must be several actions, and consequently several entries." Coke, Litt. 252 *b*.

[1] Hunt *v.* Hunt, 14 Pick. 374.

[2] See Skinner *v.* Brewer, 4 Pick. 468.

[3] Walker *v.* Thayer, 113 Mass. 36; Hastings *v.* Pratt, 8 Cush. 121; Larned *v.* Clarke, 8 Cush. 29; Gerrish *v.* Mason, 4 Gray, 432.

[4] Thompson *v.* Kenyon, 100 Mass. 108.

[5] Ellis *v.* Drake, 8 Allen, 161; Hobbs *v.* Fuller, 9 Gray, 98.

the right to enter, it is for the mortgagor to find out from the registry whether he has entered.[1]

The entry is valid although the mortgagee is owner of the equity of redemption, subject to a second mortgage, and although the second mortgagee does not know of the entry until after the expiration of the three years.[2]

After a breach of the condition of a mortgage, an entry by the mortgagee upon the premises is presumed, in the absence of evidence to the contrary, to have been for the purpose of foreclosure.[3]

IV. *The Possession.*

1258. The possession taken is a constructive rather than a literal one. The formal entry being made, the law presumes that possession continues unless its interruption be proved. The mortgagor may be permitted to remain in occupation without in any way defeating the operation of the entry; and the mortgagee need not take the rents and profits. The mortgagor holds in subordination to his mortgagee's paramount right. His possession is the possession of the mortgagee, and not adverse.[4] Even under a statute requiring "actual possession" by the mortgagee, "actual occupation" by him is not required. The occupation may continue in the mortgagor, who will be regarded as a tenant at will of the mortgagee, in whom is the possession. It is only necessary that the possession of the mortgagor or other tenant should not be adverse.[5] In Maine, however, the possession required is equivalent to an actual possession.[6] The mortgagee's formal entry does not amount to anything without continued possession for three years.[7]

The legal possession is in the mortgagee, although the mortgagor

[1] Davis *v.* Rodgers, 64 Me. 159; Chase *v.* Marston, 66 Me. 271.

[2] Tompson *v.* Tappan, 139 Mass. 506.

[3] Walker *v.* Thayer, 113 Mass. 36; Ayres *v.* Waite, 10 Cush. 72; Taylor *v.* Weld, 5 Mass. 109; Whitney *v.* Guild, 11 Gray, 496; Hunt *v.* Stiles, 10 N. H. 466, 468.

[4] Ellis *v.* Drake, 8 Allen, 161; Fletcher *v.* Cary, 103 Mass 475; Swift *v.* Mendell, 8 Cush. 357; Bennett *v.* Conant, 10 Cush. 163; Thompson *v.* Vinton, 121 Mass. 139; Porter *v.* Hubbard, 134 Mass. 233; Morse *v.* Bassett, 132 Mass. 502; Deming *v.* Comings, 11 N. H. 474; Howard *v.* Handy, 35 N. H. 315, 323; Gibson *v.* Bailey, 9 N. H. 168, 172; Kittredge *v.* Bellows, 4 N. H. 424; Hurd *v.* Coleman, 42 Me. 182; Chase *v.* Marston, 66 Me. 271

[5] Palmer *v.* Fowley, 5 Gray, 545, 546; Swift *v.* Mendell, *supra;* Gilman *v.* Hidden, 5 N. H. 30.

[6] Chamberlain *v.* Gardiner, 38 Me. 548.

[7] Chase *v.* Marston, *supra;* Jarvis *v.* Albro, 67 Me. 310.

is in actual possession; and the title to the crops growing or afterwards raised upon the premises is in the mortgagee. If after entry the mortgagee of a farm makes an arrangement with the mortgagor by which the latter is to carry on the farm, but instead of doing so he sells the equity of redemption, and the purchaser takes possession without the knowledge of the mortgagee, and raises and gathers the crops, and delivers a portion of them to a creditor who had notice of the mortgagee's claim, the mortgagee may take possession of the crops so delivered, without incurring liability to an action of tort for a conversion.[1]

V. *The Certificate of Witnesses.*

1259. What it must state. — The purpose of the certificate being to give notice to all persons concerned that the mortgagee has entered for foreclosure, its allegation must be definite, and must cover all the matters necessary to affect this change of title. The mortgage to be foreclosed must be identified. The fact of entry and the date of it are the most essential particulars. The purpose of it should be declared;[2] but the manner in which the entry is made is not of material importance so far as the certificate goes. The omission to state in terms that the entry was "open and peaceable" does not make the certificate defective;[3] it is enough to state that it was made in the presence of two witnesses. It seems, however, that it is open to the mortgagor to prove that the entry was not in fact open and peaceable if this be not alleged in the certificate.[4]

1260. The certificate duly made and recorded is conclusive evidence of the acts and statements of the mortgagee with reference to the entry, and its allegations of any fact necessary to establish foreclosure as of an actual entry having been made can-

[1] Porter *v.* Hubbard, 134 Mass. 233.

[2] In **Massachusetts** the purpose of the entry, after a breach of the condition, would be presumed to be for the purpose of foreclosure. See § **1257**. But in **Maine** it is held that a statement that the purpose of the entry is to foreclose the mortgage is essential, though the mortgagee's intention to foreclose may clearly appear. Morris *v.* Day, 37 Me. 386. The certificate in this case concluded thus: "The condition of said mortgage having been broken, the said Day claims to foreclose the same. We, the subscribers, at the request of said Day, went with him on all the premises described in the mortgage deeds, on the sixteenth day of May, A. D. 1839, and saw him enter and take peaceable possession of the premises." This was held ineffectual to establish a foreclosure.

[3] Hawkes *v.* Brigham, 16 Gray, 561; Thompson *v.* Kenyon, 100 Mass. 108.

[4] The form of certificate in general use is as follows: —

"We hereby certify that we were this

not be controlled by oral evidence.[1] The certificate cannot be contradicted by proof that the mortgagee did not actually go upon the lands. If it omit to state any essential fact, it cannot be cured by subsequent testimony of witnesses. All the facts necessary to the foreclosure must appear by the certificate, which is the only proper evidence of them.[2] The certificate is not, however, conclusive evidence that there has been a breach of the condition of the mortgage. Whether there has been a breach or not may be shown by parol evidence.[3]

The certificate of witnesses to prove the entry need not be on the mortgage deed, but may be on a separate paper.[4] The signature of a witness is sufficient if made by his mark.[5]

VI. *The Certificate of the Mortgagor.*

1261. When the mortgagor consents to the entry, and makes a certificate[6] of the fact, this is conclusive evidence of it. He is estopped to deny the fact of such entry. It is of no consequence that he continues in occupation of the premises; for after entry he must hold as tenant of the mortgagee, or in subordination to his right of possession.[7] After the mortgagor has con-

day present and saw , the mortgagee named in a certain mortgage deed given by , dated , and recorded , make an open, peaceable, and unopposed entry on the premises described in the said mortgage, for the purpose by him declared of foreclosing said mortgage for breach of the condition thereof. In witness whereof we hereto set our hands this day of

"A. B.
"C. D."

This should be sworn to.

It is not competent for the mortgagee to act as a magistrate in taking the oath of the witnesses to a certificate of his own open, peaceable, and unopposed entry upon land for the purpose of foreclosure. The certificate is in effect a deposition *in perpetuam*, taken *ex parte*, which conclusively and finally establishes, as between the mortgagee and the mortgagor, the facts therein stated. The mortgagee cannot be allowed to take a deposition in a suit to which he is himself a party. Judd *v.* Tryon, Supreme Ct. of Mass., Sept. 1881. The certificate may be sworn to before a notary public, though the statute specifies a justice of the peace. Murphy *v.* Murphy (Mass.), 13 N. E. Rep. 474.

[1] Oakham *v.* Rutland, 4 Cush. 172; Swift *v.* Mendell, 8 Cush. 357; Ellis *v.* Drake, 8 Allen, 161; Thompson *v.* Kenyon, 100 Mass. 108, 112.

[2] Morris *v.* Day, 37 Me. 386.

[3] Hill *v.* More, 40 Me. 515; Pettee *v.* Case, 11 Gray, 478.

[4] Bartlett *v.* Johnson, 9 Allen, 530.

[5] Thompson *v.* Kenyon, *supra.*

[6] The following is a usual form of a mortgagor's certificate: —

"I, the within named mortgagor, hereby acknowledge and certify that , the within named mortgagee, has this day made an open, peaceable, and unopposed entry upon the premises described in the within mortgage, for breach of the condition that it contained. Witness my hand this day of .

"A. B."

[7] Lawrence *v.* Fletcher, 10 Met. 344; Oakham *v.* Rutland, *supra;* Bennett *v.*

veyed the equity of redemption to a third person, and has no further interest in it, he cannot give a good certificate, although he remains in possession of the premises.[1] If, however, he has taken back a mortgage of the premises on conveying them, he as well as the purchaser should consent to the entry.[2]

VII. *When the Limitation commences.*

1262. The limitation of three years commences after the entry has been made and possession acquired for a breach of the condition of the mortgage; and as the law does not take notice of fractional parts of a day, the continuance of the possession commences the day following that of the entry; so that in the computation of the three years that day is excluded.[3] The possession commences on the day of entry, although the certificate be not recorded till afterwards.[4] If the entry was before breach of the condition, the time limited for redemption does not commence to run until the condition is broken, and notice in writing given by the mortgagee that he will from that time hold the premises for a breach of the condition, or a new and formal entry for breach of the condition is made. A certificate of such notice or new entry must be recorded.[5]

If a mortgagee or his assignee, while a writ of entry for the foreclosure of the mortgage is pending, enter for the purpose of foreclosure, and hold possession of the premises until the writ of possession is issued in the suit, he may justify his possession as "by process of law" under the statute, as commencing at the date of such writ; and the foreclosure will be complete in three years from that time.[6] If the action for possession be brought after an

Conant, 10 Cush. 163, 166, Swift *v.* Mendell, 8 Cush. 357.

In **Maine** it is held actual possession must be taken; the mortgagor's consent to entry and declaration that "possession is hereby given" is not sufficient, unless actual entry was made. Chamberlain *v.* Gardiner, 38 Me. 548; Storer *v.* Little, 41 Me. 69; Pease *v.* Benson, 28 Me. 336. In **Massachusetts** this certificate must be made on the mortgage deed. G. S. 1860, ch. 140, § 2.

[1] Sisson *v.* Tate, 109 Mass. 230.

[2] Chase *v.* Gates, 33 Me. 363.

[3] Fuller *v.* Russell, 6 Gray, 128.

[4] Thompson *v.* Vinton, 121 Mass. 139.

[5] G. S. of Mass. ch. 140, §§ 10, 11, adopting the law as laid down in Pomeroy *v.* Winship, 12 Mass. 514; Scott *v.* McFarland, 13 Mass. 309, 313; Ayres *v.* Waite, 10 Cush. 72, 78; Merriam *v.* Merriam, 6 Cush. 91; Erskine *v.* Townsend, 2 Mass. 495; Hunt *v.* Stiles, 10 N. H. 466; Willard *v.* Henry, 2 N. H. 120.

In **New Hampshire**, as already seen, there is a special provision of statute for the publication of a notice by a mortgagee already in possession, stating that from a certain day he will hold for the purpose of foreclosure. G. S. 1867, ch. 122, § 14.

[6] Hurd *v.* Coleman, 42 Me. 182.

entry *in pais*, and judgment is obtained and possession delivered upon the execution, the three years will run from the time of delivery of possession under the execution.[1]

In Maine, when foreclosure is effected under provision of statute by the publication of notice of an entry to foreclose, the limitation of three years for redemption runs from the first publication of notice.[2]

In New Hampshire the limitation of one year runs from the time of entry, if notice of it is published as provided by statute.[3]

The foreclosure is defeated by a tender or payment of the amount due on the mortgage before the expiration of the three years. If the last day of the three years falls on Sunday, a tender of the amount on the day following is too late.[4]

VIII. *Record of the Certificate.*

1263. The certificate, whether made by the mortgagor or by the witnesses, must be recorded within the time specified by statute, to render it effectual as evidence of the entry. The record of the certificate being all the notice of the entry required to be given, it is essential that the record be made as required, or the certificate is wholly inoperative.[5] If the date of the entry be not stated the certificate is insufficient, although this be dated and recorded, for it is not certain that the record was made within thirty days from the time of the entry.[6] When so recorded it is constructive notice of the entry to all persons who claim by any title acquired subsequently to the mortgage.[7] It is sufficient evidence of an eviction of the holder of the equity of redemption to enable him to sustain an action against his grantor for breach of a covenant of warranty.[8]

IX. *Effect of the Foreclosure upon the Mortgage Debt.*

1264. The foreclosure, when complete, operates as payment of the debt to the extent of the value of the land at the time when the foreclosure became absolute.[9] It has the effect of

[1] Fay *v.* Valentine, 5 Pick. 418; Page *v.* Robinson, 10 Cush. 99, 101.

[2] R. S. 1871, ch. 90, §§ 5, 6. See Holbrook *v.* Thomas, 38 Me 256.

[3] G. S. 1867, ch. 122, § 14; Howard *v.* Handy, 35 N. H. 315.

[4] Haley *v.* Young, 134 Mass. 364.

[5] Robbins *v.* Rice, 7 Gray, 202; Souther *v.* Wilson, 29 Me. 56; Potter *v.* Small, 47 Me. 293.

[6] Freeman *v.* Atwood, 50 Me. 473.

[7] Lennon *v.* Porter, 5 Gray, 318, 319; Robbins *v.* Rice, *supra.*

[8] Furnas *v.* Durgin, 119 Mass. 500.

[9] See § 952; Smith *v.* Packard, 19 N. H. 575.

a payment, and makes absolute the title of the mortgagee, although the note secured was void for any reason ; as, for instance, a note given for the price of intoxicating liquors sold in violation of law, and therefore void by statute.[1] In such case, although the mortgage could not be enforced, and the owner of the equity of redemption could have defeated it at any time before the foreclosure was completed, yet, the mortgagee having entered and kept possession till the right to redeem is foreclosed, he then has an absolute title ; and the land is applied by operation of law to the payment of the debt.

X. *Waiver of Entry and Foreclosure.*

1265. By express or implied agreement. — An entry to foreclose, or a foreclosure, when completed, may be waived by the express agreement of the parties, or by facts from which such agreement may be inferred. It is waived by the mortgagee's giving a bond just before the completion of the possession, with condition to discharge the mortgage upon payment of the debt at a future day ;[2] or by giving an agreement that if the debt be paid by a certain time no advantage shall be taken of the foreclosure ;[3] or by stipulating in writing to reconvey whenever the debt should be satisfied out of the rents and profits, or in any other way ;[4] or by promising to allow the mortgagor six months for redemption after the expiration of the regular time limited,[5] or by a statement made a month before the time of redemption would expire that he would give some time, but would not wait long without taking advantage of the mortgage.[6]

In all cases, however, when the waiver is not absolute, but is for a limited time, advantage can be taken of it only within the time limited.[7] The condition of the waiver or extension must be complied with.[8] An express waiver of entry, though executed under seal, is not effectual unless it is delivered to the holder of the equity of redemption.[9]

If the mortgagor remains in occupation of the mortgaged premises for many years after the expiration of the time of redemption,

[1] McLaughlin *v.* Cosgrove, 99 Mass. 4, per Mr. Justice Chapman. "In a case like the present, it is as if the mortgagor had purchased the liquors and paid for them by an absolute conveyance of the land." See § 617.

[2] Joslin *v.* Wyman, 9 Gray, 63.

[3] McNeil *v.* Call, 19 N. H. 403, 416.

[4] Quint *v.* Little, 4 Me. 495.

[5] Chase *v.* McClellan, 49 Me. 375.

[6] Danforth *v.* Roberts, 20 Me. 307.

[7] Danforth *v.* Roberts, *supra.*

[8] Clark *v.* Crosby, 101 Mass. 184.

[9] Cutts *v.* York Manuf. Co. 14 Me. 326.

and pays taxes upon them, and interest to the mortgagee, these facts are consistent only with the relation between the parties of mortgagor and mortgagee, and justify the conclusion that the mortgage has not been foreclosed.[1] Giving permission to the mortgagor to cut timber on the mortgaged land, and receiving stumpage from him, is not inconsistent with the further prosecution of foreclosure by notice in the newspapers in the mode permitted by statute in Maine, as this mode does not involve the actual possession of the premises by the mortgagor.[2]

1266. An assignment of a mortgage after an entry does not of itself stay the foreclosure. The assignee takes all the benefits of the entry and possession.[3] An assignment of both the mortgage and note, after the expiration of three years from the entry, to a subsequent mortgagee, is no release of the foreclosure.[4]

Foreclosure is not waived or postponed by an assignment of the mortgage before the expiration of the time of redemption to one who, at the request of the mortgagor, pays the mortgagee the amount of the mortgage, and agrees orally with the mortgagor to hold the estate subject to such advance for the use of the mortgagor, and to permit him to sell the land in lots and pay over the proceeds, or to redeem on paying the amount so advanced at any time.[5] The assignee in such case takes all the legal rights of the mortgagee, and the foreclosure goes on. He holds the property under no resulting trust, because the consideration is wholly paid by him; and under no express trust, because not declared in writing. The agreement does not constitute a mortgage, because it was not made with one from whom an absolute title was taken simultaneously.

But an assignment made for the purpose of preventing a redemption, as, for instance, if it be made immediately before the time of redemption would expire, so that the mortgagor does not

[1] Trow *v.* Berry, 113 Mass. 139.

[2] Smith *v.* Larrabee, 58 Me. 361.

[3] Deming *v.* Comings, 11 N. H. 474; Hill *v.* More, 40 Me. 515; Hurd *v.* Coleman, 42 Me. 182; Cutts *v.* York Manuf. Co. 14 Me. 326.

[4] Thompson *v.* Kenyon, 100 Mass. 108. The assignment in this case was by a quitclaim deed for a consideration equal to the amount due on the first mortgage and interest accrued. The mortgagor had filed a bill in equity to redeem just before the expiration of the three years. While the suit was pending the three years expired, but the mortgagor subsequently abandoned the suit. The second mortgagee, by the assignment, succeeded to all the rights of the first mortgagee, and held the land by an indefeasible title under a completed foreclosure.

[5] Capen *v.* Richardson, 7 Gray, 364.

know to whom to make payment, may have the effect to keep the redemption open till a tender can be made to the assignee;[1] and even if it be made without such intent, it may have the effect to keep the equity open until the mortgagor can find the assignee and offer to perform the condition.[2]

1267. The waiver, to be effectual, must be by the holder of the mortgage. One who has not acquired any interest in the mortgage cannot by his agreement extend the time of redemption beyond the period when it would otherwise be foreclosed;[3] though if he should afterwards take an assignment of the mortgage, he would doubtless be concluded by this, and the foreclosure opened accordingly. The assignee of a mortgage assigned to him by the mortgagee as security for the payment of a debt of his, may, after entering with the knowledge of the mortgagee to foreclose, waive and release this entry without the assent of the mortgagee. The assignee has full control of the remedies provided by law, and may enter into or relinquish possession at his discretion.[4]

If after entry the mortgagee be put under guardianship as a spendthrift, the guardian has authority to restore possession to the mortgagor, to hold as before the entry, and to prevent a foreclosure.[5] Such restoring of possession will do away with the effect of the entry and prevent foreclosure.[6]

1268. An entry does not waive rights acquired under a previous purchase at a sale under a power. Where a mortgagee has indirectly become a purchaser at a sale made under a power contained in the mortgage, which gave him no right to purchase, and the sale is for this reason voidable, he may enter to foreclose, and record his certificate of entry without waiving or abandoning any rights acquired by the purchase. The entry in itself does not show such intention.[7]

1269. Payment works a waiver. An entry to foreclose, as well as a foreclosure itself, is of course waived by subsequently receiving payment of the mortgage debt;[8] or of any part of it;[9] or by receiving articles which the mortgagor had agreed in the condition of the mortgage to furnish in support of the mortgagee,

[1] McNeil *v.* Call, 19 N. H. 403, 414.

[2] Deming *v.* Comings, 11 N. H. 474.

[3] Fisher *v.* Shaw, 42 Me. 32.

[4] Cutts *v.* York Manuf. Co. 14 Me. 326.

[5] Botham *v.* M'Intier, 19 Pick. 346.

[6] Ibid.

[7] Learned *v.* Foster, 117 Mass. 365.

[8] Robinson *v.* Batchelder, 4 N. H. 40; Gould *v.* White, 26 N. H. 178; Green *v.* Cross, 45 N. H. 574, 577.

[9] And see Winchester *v.* Ball, 54 Me. 558.

who continued to reside with the mortgagor;[1] or by receiving interest as such on the mortgage debt.[2] But the mere fact that, after the three years' payments are made on account of the mortgage debt, will not open the foreclosure. Such payments may have been made because the premises were not of sufficient value to satisfy the debt. The intention of the parties to waive the foreclosure should be shown by other evidence.[3] If the mortgagee, after the expiration of three years from his entry, at the request of the mortgagor, conveys the premises to a third person by a deed reciting that it is made at the request of the mortgagor, and is intended to discharge all title acquired by the mortgagee, the grantee having paid the amount due on the mortgage, the grantee takes a title subject to redemption by the mortgagor.[4] But a quitclaim deed by a mortgagee after foreclosure to one of two mortgagors, in consideration of a sum equal to the original mortgage debt, is not sufficient evidence of an opening of the foreclosure to revest any title in the other mortgagor as a joint-owner.[5] After the foreclosure there was no privity between the mortgagors. The grantee had as good a right to purchase as a stranger. The fact that he paid a sum equal to that due on the mortgage at that time is no presumption that the transaction was a redemption for the benefit of both.

1270. If the payment be made and received under an express understanding that the foreclosure is to be opened, there can be no question that it is opened.[6] Facts and circumstances from which an express understanding may be clearly inferred avail equally.[7] But the acts of the parties will not have this effect when they are such as to leave their intention doubtful in this respect, or when they may be explained consistently with the right of the mortgagee to retain the estate under the foreclosure.[8]

After a mortgagee has entered under a judgment in an action to foreclose the mortgage, a release of the judgment does not of itself operate as a waiver in law of the foreclosure, which will be

[1] Willard *v.* Henry, 2 N. H. 120.

[2] Trow *v.* Berry, 113 Mass. 139.

[3] Lawrence *v.* Fletcher, 10 Met. 344; Tompson *v.* Tappan, 139 Mass. 506. In **New Hampshire** the mere receipt of part of the money secured by the mortgage is held to waive the foreclosure. McNeil *v.* Call, 19 N. H. 403; Deming *v.* Comings, 11 N. H. 474; Moore *v.* Beasom, 44 N. H. 215.

[4] Rangely *v.* Spring, 28 Me. 127.

[5] Crittenden *v.* Rogers, 8 Gray, 452.

[6] Dow *v.* Moor, 59 Me. 118.

[7] Stetson *v.* Everett, 59 Me. 376.

[8] Lawrence *v.* Fletcher, 8 Met. 153.

complete if he retains continued, actual possession during the time provided by statute for the purpose of foreclosing. His possession is, by virtue of his mortgage title, established by the judgment, and not under the process.[1]

1271. The entry is not waived by the mortgagee's rendering an account charging himself with rent for a period after the entry;[2] nor by his neglect or refusal to render an account to the mortgagor at his request of the amount due on the mortgage.[3] If a mortgagee in his answer made in a suit in equity to redeem the mortgage expressly waives all objection to redemption, upon payment of all sums due upon it, he cannot afterwards claim that the mortgage had been foreclosed before the suit was commenced.[4]

1272. Conditional waiver. — A mortgagee does not waive a foreclosure which has already become absolute, or extend the time of redemption, by agreeing to allow the mortgagor to redeem the premises upon the payment before a certain date of an amount equal to what was due on the mortgage on that day, if the agreement be not fulfilled by payment or tender of the money within the time limited.[5] And so if a surety or other person in behalf of the mortgagor pays the conditional judgment, and takes an assignment of it either before or after the lapse of the three years from the time possession was taken, under an agreement with the mortgagor to assign it to him if he should pay the amount within a certain time, if the agreement be not kept there is no waiver of the foreclosure, which becomes perfect in the hands of the assignee.[6] And so also an agreement by the mortgagee to sell his foreclosure title to the mortgagor for the amount of the mortgage debt, to be paid within a certain time, is not sufficient to open the foreclosure.[7]

1273. The entry is not waived by the mortgagee's bringing a writ of entry against a tenant at will of the mortgagor, and obtaining judgment for possession, although in such a writ the demandant describes himself as out of possession, and the tenant as wrongfully withholding possession from him. This is only a technical and formal admission made for the purpose of enforcing a convenient remedy. It is no admission that the mortgagee is out of possession, or that he waives the benefit of his formal en-

[1] Couch *v.* Stevens, 37 N. H. 169.
[2] Hobbs *v.* Fuller, 9 Gray, 98.
[3] Sanborn *v.* Dennis, 9 Gray, 208.
[4] Strong *v.* Blanchard, 4 Allen, 538.
[5] Clark *v.* Crosby, 101 Mass. 184.
[6] Worthy *v.* Warner, 119 Mass. 550.
[7] Stetson *v.* Everett, 59 Me. 376.

try.[1] Even the bringing of a writ of entry against the owner of the equity of redemption for the purpose of foreclosure is not an abandonment of the possession previously taken;[2] but if a conditional judgment be entered and a writ of possession issue, under which the mortgagee is put in possession, this is a waiver of a previous entry.[3] The bringing of an action of trespass for waste against the mortgagor is not an abandonment of a previous entry to foreclose.[4] A mortgagee after commencing a foreclosure by publication under the statutes of Maine may enter and take possession of the premises without waiving the proceedings to foreclose;[5] and if he is ousted of his possession after such entry he may maintain a writ of entry at common law, and obtain judgment for possession, without waiving the foreclosure commenced by publication.[6]

1274. **A recovery of judgment** for the mortgage debt or any part of it after foreclosure, on the ground that the value of the premises at the time of the foreclosure was less than the sum due, opens the foreclosure.[7] A recovery of judgment against the mortgagor for rent of the premises during the three years after entry operates, like a recovery of judgment for the debt, to open the foreclosure.[8]

After foreclosure is complete, a promise or agreement made by the mortgagee to receive the debt and release the land cannot be enforced unless made on a legal and sufficient consideration.[9]

1275. **If by accident or mistake** the time of redemption goes by, the person entitled to redeem must not delay in seeking relief. Ordinarily the foreclosure of a mortgage by entry and three years' possession is conclusive, both in law and equity, and will not be disturbed without good cause shown. Where a bill in equity to redeem was brought on the day before foreclosure would have become absolute, and by reason of being brought in the wrong

[1] Fletcher *v.* Cary, 103 Mass. 475.

[2] Beavin *v.* Gove, 102 Mass. 298; Devens *v.* Bower, 6 Gray, 126; Mann *v.* Earle, 4 Gray, 299; Merriam *v.* Merriam, 6 Cush. 91; Fletcher *v.* Cary, *supra;* Page *v.* Robinson, 10 Cush. 99; Dorrell *v.* Johnson, 17 Pick. 263.

[3] Fay *v.* Valentine, 5 Pick. 418; Smith *v.* Kelley, 27 Me. 237; Tufts *v.* Maines, 51 Me. 393.

[4] Page *v.* Robinson, *supra.*

[5] Concord Union Mut. F. Ins. Co. *v.* Woodbury, 45 Me. 447, 453.

[6] Stewart *v.* Davis, 63 Me. 539.

[7] Massachusetts G. S. 1860, ch. 140, § 33. Suit to redeem must be brought within one year after the recovery of the judgment.

[8] Morse *v.* Merritt, 110 Mass. 458.

[9] Smalley *v.* Hickok, 12 Vt. 153.

county was dismissed, and there was no tender, or agreement to extend the time of redemption, the court refused to open the foreclosure on a new bill brought nearly a year after the dismissal of the former one.[1]

[1] Webb *v.* Nightingale, 14 Allen, 374.

CHAPTER XXIX.

FORECLOSURE BY WRIT OF ENTRY.

I. Nature of and where used, 1276–1279.
II. Who may maintain, 1280–1289.
III. Against whom the action may be brought, 1290, 1291.
IV. The pleadings and evidence, 1292–1295.
V. The defences, 1296–1305.
VI. The conditional judgment, 1306–1316.

I. *Nature of and where used.*

1276. The process of foreclosure by a writ of entry as used in Massachusetts and Maine, although in form a suit at law, is in effect a bill in equity. When used for this purpose the technical rules applicable to this action at common law are not in all respects followed. A judgment does not necessarily give possession; it provides for this only upon the default of the owner of the equity of redemption to perform the condition of the mortgage within a specified time. The amount due on the mortgage for which conditional judgment is entered is ascertained according to equity and good conscience, and by the same rules as this amount is determined in a bill in chancery to redeem the same mortgage; insomuch that such conditional judgment is conclusive evidence, on the hearing of a subsequent bill to redeem the same mortgage, of the amount due on it.[1]

This process is used only in those states in which foreclosure is effected by entry *in pais* and possession.

1277. In Massachusetts[2] and Maine,[3] instead of possession

[1] Holbrook *v.* Bliss, 9 Allen, 69; Fletcher *v.* Cary, 103 Mass. 475, 479; Palmer *v.* Fowley, 5 Gray, 545; Sparhawk *v.* Wills, 5 Gray, 423, 427; Walcutt *v.* Spencer, 14 Mass. 409; Amidown *v.* Peck, 11 Met. 467; Peck *v.* Hapgood, 10 Met. 172; Doten *v.* Hair, 16 Gray, 149.

[2] G. S. ch. 140, §§ 1–11.

In Massachusetts, by the Prov. Stat. of 10 W. 3, ch. 14, entitled "An act for hearing and determining of cases in equity," the courts, in all cases of "forfeiture of estates on condition, executed by deed of mortgage, or bargain and sale, with defeasance," were empowered "to moderate the rigor of the law, and, on consideration of such cases according to equity and good conscience, to chancer the forfeiture,

[3] R. S. 1871, ch. 90, §§ 7, 8, 10, 12; Laws 1872, ch. 18; amended in material parts by Acts 1881, ch. 84.

obtained by entry, the mortgagee may recover possession by writ of entry, declaring on his own seisin, stating that it is in mortgage; and if it appears that he is entitled to possession for breach of the condition, the court on motion of either party awards a conditional judgment, if the defendant be the mortgagor or any one claiming under him, that if he within two months after the judgment pays to the plaintiff the sum found due on the mortgage with interest and costs the mortgage shall be void; otherwise that the plaintiff shall have his execution for possession. If but part of the mortgage money is due, or the condition of the mortgage be for the doing of any other thing, the terms of the judgment are varied as the case may require.[1]

The action may be brought by an assignee of the mortgagee, and after his death by his executor or administrator. It may be brought against whoever is tenant of the freehold, and the mortgagor may in all cases be joined as a defendant whether he then has any estate in the premises or not; but he is not liable for costs when he has no estate, and makes no defence to the suit. Possession obtained in this way must be continued for three years to foreclose the right of redemption.

1278. In New Hampshire, also, possession may be obtained by a writ of entry; and when so obtained no notice by publication, as in the case of an entry *in pais*, is necessary. Actual possession continued one year completes the foreclosure.[2] The process should be against the party in possession claiming title.[3] The judgment is conditional, that if the mortgagor shall pay the sum found due within two months after judgment rendered, with interest, the judgment shall be void, otherwise a writ of possession shall issue.[4]

and enter up judgment for the just debt and damages, and to award execution accordingly; only in real actions upon mortgage, or bargain and sale, with defeasance, the judgment to be conditional that the mortgagor or vendor, or his heirs, executors, or administrators, do pay unto the plaintiff such sum as the court shall determine to be justly due thereupon, within two months' time after judgment entered up for discharging of such mortgage or sale; or that the plaintiff recover possession of the estate sued for, and execution be awarded for the same." Prov. Stat. (ed. 1726) 109. This was reënacted in 1785. St. 1785, ch. 22, § 1.

[1] See Stewart *v.* Clark, 11 Met. 384, 389; Holbrook *v.* Bliss, 9 Allen, 69, 73. An abstract of the writ of possession, with the time of obtaining possession, must be recorded. **Maine**: R. S. 1883, ch. 90, § 3. A foreclosure is ineffectual without such record. Bird *v.* Keller, 77 Me. 270.

[2] G. L. 1878, ch. 136, § 14.

[3] Green *v.* Cross, 45 N. H. 574, 578.

[4] G. S. ch. 112, § 14; ch. 213, § 12; G. L. 1878, ch. 232, § 12.

1279. In Rhode Island, instead of a writ of entry for obtaining possession of the mortgaged premises, an action of ejectment, or of trespass and ejectment, is used for the purpose. In such action, where a right of redemption is shown, the court ascertains the sum due on the mortgage, and renders a conditional judgment, that if the mortgagor, his heirs, executors, administrators, and assigns, shall pay to the plaintiff, or deposit in the clerk's office for him, the sum adjudged due, within two months from the entry of the judgment, with interest, then the mortgage shall be void, otherwise that the plaintiff shall have his writ of possession.[1]

II. *Who may maintain.*

1280. A legal interest in the realty is essential to sustain a writ of entry to foreclose a mortgage. The action must therefore be brought by the mortgagee, or his assignee, or by the personal representatives of the holder of the mortgage upon his decease. The plaintiff must hold the legal estate at the time he brings the action, and it is immaterial that he holds the title for the benefit of another; a *cestui que trust* cannot maintain the action.[2] If the plaintiff be the assignee of the mortgage, he must show a formal assignment of the mortgage to himself. An equitable assignment merely is not sufficient. Therefore, one who holds a mortgage note by indorsement alone, without an assignment of the mortgage, cannot maintain the action in his own name. He has at most only a resulting trust in the mortgage title.[3] The mortgagee after such indorsement, although holding only a barren fee without beneficial interest, is presumed, in the absence of any agreement, or anything to indicate the intention of the parties, to hold such title in trust for the indorsee, to whom it would be of value;[4] and the mortgagee might maintain a writ of entry to foreclose for the benefit of such assignee at his request. An assignee of the debt merely has the right to use the name of the mortgagee in a writ of entry to enforce the mortgage, and is not required to resort to a court of equity for that purpose, unless the mortgagee refuses to permit his name to be used.[5] In some

[1] G. S. 1872, ch. 205, § 7; P. S. 1882, ch. 216, § 7.

[2] Somes *v.* Skinner, 16 Mass. 348; Young *v.* Miller, 6 Gray, 152, 154.

[3] Johnson *v.* Brown, 31 N. H. 405; Young *v.* Miller, *supra.*

[4] Johnson *v.* Brown, *supra.*

[5] Holmes *v.* French, 70 Me. 341. In such case the same rules of law are applicable to the assessment of the amount of the conditional judgment that would be applicable if the debt and mortgage were owned by the mortgagee.

states the mere transfer of the note is held to carry with it the mortgage security, and the right to enforce that; but the remedy in those states is an equitable one and not by writ of entry.

1281. **After assignment.** — Although a mortgagee who has formally assigned his mortgage cannot proceed to foreclose it, and a judgment obtained by him would be nugatory,[1] yet, if the assignee reindorse and redeliver the mortgage with the assignment cancelled, it never having been recorded, he may still maintain the action.[2] By the cancellation of the assignment it is rendered useless and ineffectual to the assignee, and the mortgage remains in full force and effect in the mortgagee, who alone has any interest in it, or any right to enforce it.

1282. **A mortgagee who has made an assignment absolute in form, but really intended as security for a debt,** may nevertheless maintain an action to foreclose the mortgage, where the nature of the transaction is shown by an acknowledgment by the assignee that he has "received full satisfaction for the debt secured by the above assignment." This acknowledgment relates back to the time of the making of the assignment, and is conclusive evidence of an agreement then made by the assignee to reassign. The acknowledgment is a defeasance of the assignment, and the whole transaction a mortgage of a mortgage.[3]

The mortgagee who holds the legal title under the mortgage may maintain the writ in his own name alone, although the security is partly for the benefit of other persons mentioned in the deed; as where a father conveys his homestead to his son, and takes a mortgage back in his own name, to secure the maintenance of himself and wife, and also the payment to other children of certain sums as their portion of their father's estate. He may maintain the action, although the object of it be wholly to enforce the payment of the sums due to his children.[4]

A mortgagee who has assigned his mortgage and note as collateral security for a debt of his own, and upon paying this has received a reassignment of the mortgage, may maintain a writ of entry to foreclose it, although the note was lost while in the hands of the assignee.[5] It does not matter that the assignee of the

[1] Call *v.* Leisner 23 Me. 25; Gould *v.* Newman, 6 Mass. 239.

[2] Howe *v.* Wilder, 11 Gray, 267.

[3] Coffin *v.* Loring, 9 Allen, 154. But it would seem that the nature of the transaction in such case could not be shown by parol. Lincoln *v.* Parsons, 1 Allen, 388.

[4] Northy *v.* Northy, 45 N. H. 141.

[5] Ward *v.* Gunn, 12 Allen, 81.

mortgage also purchases the equity of redemption on execution against the mortgagor; as the mortgage does not merge, and the mortgagee has a remaining right, he may recover possession of the land by writ of entry, without making actual entry.[1]

A deed by the mortgagee, whether a warranty or quitclaim, passes his title in the same way that an assignment would; and although the notes secured by the mortgage are not transferred at the same time, the grantee may maintain a writ of entry to foreclose the mortgage, and on producing the notes may have a conditional judgment.[2]

If the mortgage be assigned while a writ of entry is pending, the assignee may, by virtue of his assignment, prosecute the suit in the name of the mortgagee for his own benefit to final judgment, and enter under the writ of possession when it is issued in the same manner as the mortgagee might have done.[3]

An assignee may bring his action for possession, although the assignment to him has not been recorded at the time; but it would seem that before trial of the action it must be recorded,[4] in order to authorize its introduction in evidence.

1283. One of two or more joint mortgagees or assignees of a mortgage cannot alone maintain a writ of entry to foreclose the mortgage. All the persons having a legal interest in the mortgage must join in enforcing it.[5] If it be held by them in trust, the abandonment of the trust by one of them does not vest the title in the others, without deed or legal process; though on the death of one, the survivors succeed to the rights and remedies to which all of them were before jointly entitled.[6] If, however, a mortgage be given to secure separate debts or obligations, each mortgagee is entitled to enforce his rights in his own name; as, for instance, a mortgage given for the support of a father and mother, "each and severally," may be enforced by the father alone.[7] When a mortgage is given to secure several debts, the obvious purpose is to give to each security for his particular debt. If the mortgagees hold separate notes secured by the same mortgage, each has a right to enforce his claim under the mortgage, and there is of course no right of survivorship.[8] In New Hamp-

[1] Tuttle *v.* Brown, 14 Pick. 514.

[2] Ruggles *v.* Barton, 13 Gray, 506.

[3] 808; Hurd *v.* Coleman, 42 Me. 182.

[4] Wolcott *v.* Winchester, 15 Gray, 461, 466.

[5] Webster *v.* Vandeventer, 6 Gray, 428. See Dewey *v.* Brown, 2 Pick. 387; Aiken *v.* Gale, 37 N. H. 501.

[6] Blake *v.* Sanborn, 8 Gray, 154; Burnett *v.* Pratt, 22 Pick. 556.

[7] Gilson *v.* Gilson, 2 Allen, 115.

[8] Burnett *v.* Pratt, *supra.*

shire it is held that the action must be brought in the names of all the holders of the several notes.[1]

Two mortgages given by the same mortgagor at the same time to two mortgagees severally, makes them tenants in common, and their rights are the same as if one mortgage had been made to both, to secure to each his separate debt. Either of them may enforce his mortgage by separate suit, or both may join in one suit, just as they might in a chancery suit.[2]

If a mortgage be made to an unincorporated association, or to a firm by a corporate or firm name, a writ of entry to foreclose it must be brought in the names of the individuals who compose the firm or do business under such general name.[3]

1284. Two mortgages of the same land made by the same mortgagor, and held by the same assignee, though given at different times to different persons, may be embraced in one suit of foreclosure, and a conditional judgment for the amount of both debts may be entered.[4] The judgment should properly specify the amount due on each mortgage as well as the aggregate amount due, so that the rights of any intervening third party might be determined. If the two mortgages embraced distinct parcels of land, or the debts were due from different persons, they cannot be united in one suit, and consolidated in one judgment.[5]

1285. A second mortgagee may maintain an action to foreclose his mortgage against the owner of the equity of redemption, although such owner also holds the first mortgage. The judgment in such case would be valid and effectual to foreclose the second mortgage as against all titles subsequent to it, but qualified as to disturbing the possession under the prior mortgage. The first mortgagee has the right to hold the estate under his mortgage for the purpose of foreclosure as against the second mortgagee; but the second mortgagee has the right to such possession as will enable him to foreclose as against the right to redeem his second mortgage. The foreclosure of both mortgages may go on at the same time: the first mortgagee having such possession as will operate to foreclose against the right of the second mortgagee to redeem; and the second mortgagee having

[1] Noyes *v.* Barnet, 57 N. H. 605; Johnson *v.* Brown, 31 N. H. 405; Page *v.* Pierce, 26 N. H. 317.

[2] Cochran *v.* Goodell, Supreme Ct. of Mass. October, 1881.

[3] Pomeroy *v.* Latting, 2 Allen, 221. The mortgage in this case was to "The Copake Iron Works," a partnership.

[4] Pierce *v.* Balkam, 2 Cush. 374. See, also, Grant *v.* Galway, 122 Mass. 135.

[5] Peck *v.* Hapgood, 10 Met. 172.

such constructive possession as will operate to foreclose against the right to redeem the estate from his mortgage. The possession of each operates according to his rights.[1]

In such case it is, of course, immaterial that the owner of the equity of redemption, besides holding the first mortgage, holds a third mortgage or any other interest in the property. Under the execution the second mortgagee may be put temporarily in possession without an actual ouster of the first mortgagee, and such possession will foreclose all titles subsequent to the second mortgage.[2] It is all the same whether the first mortgagee be in possession under an entry *in pais*, or by virtue of a writ of possession issued under a conditional judgment for foreclosure.[3]

A mortgagee of a remainder or reversion may in like manner maintain such action during the lifetime of the tenant of the particular estate.[4] In such case the tenant cannot be dispossessed, but the officer may, under the execution, deliver possession as against the mortgagor, so as to divest him of all his legal title in the land. One joint-owner of the equity of redemption, on receiving an assignment of the mortgage, may maintain a writ of entry and recover a conditional judgment against the other.[5]

1286. Homestead right. — This action may be maintained and judgment may be rendered thereon and formal possession taken, although there be an outstanding estate of homestead. The entry thus made is sufficient to bar the right in equity to redeem the reversionary estate after the expiration of three years, though subject to the full enjoyment of the homestead estate.[6]

If the homestead right has been released in the mortgage, it is no defence to the writ of entry to foreclose the mortgage that the estate is sufficient to satisfy the mortgage, without having recourse to the homestead.[7] "The power of a court of chancery to compel a mortgagee to resort in the first instance to one of several estates mortgaged is exercised only for protection of the equities of different creditors or incumbrancers, or of sureties, and not for the benefit of the mortgagor. As against him, the mortgagee has the right to enforce the contract between them

[1] Kilborn *v.* Robbins, 8 Allen, 466; Cronin *v.* Hazletine, 3 Allen, 324; Doten *v.* Hair, 16 Gray, 149; Cochran *v.* Goodell, Sup. Ct. of Mass. Oct. 1881. See Palmer *v.* Fowley, 5 Gray, 545.

[2] Cronin *v.* Hazletine, *supra;* George *v.* Baker, 3 Allen, 326.

[3] Amidown *v.* Peck, 11 Met. 467, 469; Walcutt *v.* Spencer, 14 Mass. 409.

[4] Penniman *v.* Hollis, 13 Mass. 429.

[5] Aiken *v.* Gale, 37 N. H. 501.

[6] Doyle *v.* Coburn, 6 Allen, 71.

[7] Searle *v.* Chapman, 121 Mass. 19. See §§ 731, 1632.

according to its terms, and is not obliged to elect between different remedies or securities. The right of homestead, created by our statutes, is certainly entitled to no higher degree of favor than the courts have always accorded to the common law right of dower. The case cannot be distinguished in principle from the ordinary one in which a wife, who has joined by way of releasing dower in the mortgage of her husband, is held to pay the whole mortgage debt as a condition of asserting her right of dower against the mortgagee."[1]

1287. A mortgagee who has entered to foreclose in the presence of witnesses, and still remains in possession, may nevertheless maintain a writ of entry against the mortgagor to foreclose the mortgage;[2] and such previous possession is not waived or abandoned by the commencement of the action;[3] though it is upon delivery of possession to the mortgagee upon an execution issued on the judgment obtained in such action.[4]

The fact that a mortgage contains a power of sale is no objection to a foreclosure by writ of entry. The power of sale is merely a cumulative remedy which does not interfere with a foreclosure by action, or by entry and possession.[5]

1288. If the holder of the mortgage die before entry for condition broken, the mortgage, being personal assets, goes to his executor or administrator, who alone can maintain an action upon it. His heirs have no such interest as will give them any right of possession.[6]

1289. When right of action accrues. — Unless it is expressly stipulated that the mortgagor may remain in possession, or the necessary implication from the deed is that he may do so, the mortgagee may at once, before breach of the condition, and without previous notice of the suit, maintain a writ of entry for the possession.[7] The provisions or conditions in the mortgage deed may be such that they will necessarily imply a covenant that the mortgagor may occupy so long as he fulfils these conditions, and

[1] Per Gray, C. J., in Searle *v.* Chapman, 121 Mass. 19.

[2] Beavin *v.* Gove, 102 Mass. 298; Merriam *v.* Merriam, 6 Cush. 91; Devens *v.* Bower, 6 Gray, 126; Page *v.* Robinson, 10 Cush. 99; Mann *v.* Earle, 4 Gray, 299, 300; G. S. of Mass. ch. 140, §§ 1, 11.

[3] Page *v.* Robinson, *supra.*

[4] Fletcher *v.* Cary, 103 Mass. 475.

[5] Furbish *v.* Sears, 2 Cliff. 454.

[6] Smith *v.* Dyer, 16 Mass. 18; Dewey *v.* Van Deusen, 4 Pick. 19; Shelton *v.* Atkins, 22 Pick. 71. See G. S. of Mass. ch. 96, § 9; ch. 140, § 7.

[7] See § 702; Hobart *v.* Sanborn, 13 N. H. 226; Dearborn *v.* Dearborn, 9 N. H. 117; Lackey *v.* Holbrook, 11 Met. 458; Newall *v.* Wright, 3 Mass. 138, 155.

they may thus constitute a good bar to a writ of entry at common law to obtain possession ;[1] thus, where the mortgage recited that the mortgagee had conveyed the premises to the mortgagor "for the future maintenance and support" of the former, and that the mortgagor had "at the same time reconveyed the same to the mortgagee as security for such maintenance and support," the condition being that the mortgagor should support the mortgagee, it was held to be a necessary implication from these recitals that the mortgagor should retain possession so long as he performed the acts, the performance of which the mortgage was given to secure.[2] In the absence, however, of anything in the mortgage to show that the mortgagor is entitled to possession, it cannot be shown by parol evidence that it was agreed by the parties that the mortgagor should retain possession.[3]

III. *Against whom the Action may be brought.*

1290. The action is brought against the tenant of the freehold, who is a necessary party defendant.[4] Action cannot be maintained against a tenant at will or for years, if he is willing to give up possession of the premises.[5] If, however, such tenant refuses to yield possession when it is demanded of him, he may be regarded as a disseisor, and, as against the mortgagee, the tenant of the freehold.[6] On this ground the action may be maintained against a purchaser of the equity of redemption after he has conveyed it away again, but still retains possession and refuses to yield it on demand ; but the judgment will be for possession in the ordinary form, and not a conditional judgment.[7]

The fact that the mortgagors were blind, and their father lived with them, and was the only manager and efficient agent on the premises, which he cultivated and improved, does not make him a tenant of the land or liable to the action.[8]

1291. A wife who has signed the mortgage merely in release

[1] Bean *v.* Mayo, 5 Me. 89.

[2] Wales *v.* Mellen, 1 Gray, 512. See § 668.

[3] Colman *v.* Packard, 16 Mass. 39.

[4] G. S. of Mass. ch. 140, § 8 ; R. S. of Me. 1871, ch. 90, § 12 ; Dooley *v.* Potter, 140 Mass. 49, per Devens, J.

[5] Wheelwright *v.* Freeman, 12 Met. 154 ; Raynham *v.* Snow, 12 Met. 157. Under the early laws of Massachusetts it could be maintained against a tenant at will. Keith *v.* Swan, 11 Mass. 216 ; Fales *v.* Gibbs, 5 Mason, 462.

[6] Johnson *v.* Phillips, 13 Gray, 198 ; Wheelwright *v.* Freeman, *supra ;* Keith *v.* Swan, *supra ;* Hunt *v.* Hunt, 17 Pick. 118, 121.

[7] Johnson *v.* Phillips, *supra.*

[8] Churchill *v.* Loring, 19 Pick. 465.

of dower need not be joined in the suit;[1] but if the husband and wife mortgage her real estate and continue in possession till condition broken, they are rightly sued together.[2] A widow to whom dower has been assigned in the mortgaged premises, though wrongfully, is a tenant of the freehold if in possession.[3]

The action cannot be maintained against the mortgagor alone after he has conveyed the estate to a third person, and the latter has conveyed it to the mortgagor's wife to her sole and separate use, although he has continued to occupy the premises with his wife. She is the tenant of the freehold and a necessary party to the action. The mortgagor's possession must be deemed to be permissive only, and subject to and in the right and interest of his wife as owner of the fee.[4] But if a third person be in actual possession under a lease for a term of years by a title paramount to that of the mortgage, the action may be maintained against the owner of the equity of redemption.[5]

1292. The mortgagor may always be joined as a defendant, although he has parted with all interest in the premises before the action is brought. If he conveys his equity of redemption after suit is commenced against him as the tenant in possession, this does not defeat the action, but it may proceed to judgment just the same.[6] All persons coming in under him after the suit is commenced are bound by the judgment and by the possession taken under it. Were it otherwise, the suit might be wholly defeated by successive alienations;[7] and it seems that those who have acquired title under the mortgagor, after the giving of the mortgage and before the commencement of the action, are equally bound by the action, though not joined as defendants, if the execution and the proceedings upon it are duly recorded.[8]

An action may be maintained against a mortgagor to foreclose a mortgage not acknowledged or recorded, for it conveys the property as between the parties.[9]

If the mortgagor has conveyed the land in separate parcels to different persons, a writ of entry must be brought against each

[1] Pitts *v.* Aldrich, 11 Allen, 39.

[2] Swan *v.* Wiswall, 15 Pick. 126.

[3] Raynham *v.* Wilmarth, 13 Met. 414.

[4] Campbell *v.* Bemis, 16 Gray, 485.

[5] Whittier *v.* Dow, 14 Me. 298.

[6] Straw *v.* Greene, 14 Allen, 206; Hunt *v.* Hunt, 17 Pick. 118; Wheelwright *v.* Freeman, 12 Met. 154.

[7] Hunt *v.* Hunt, *supra.*

[8] Hunt *v.* Hunt, *supra;* Robbins *v.* Rice, 7 Gray, 202; G. S. of Mass. ch. 133, § 55.

[9] Howard Mut. Loan & Fund Association *v.* McIntyre, 3 Allen, 571.

tenant holding in severalty. A judgment against one of them for the whole tract does not foreclose the rights of the others.[1]

IV. *The Pleadings and Evidence.*

No attempt is made to give any statement of the pleadings and evidence applicable to this form of action; recourse must be had to the general rules on these matters, and to the practice of the states where this form of foreclosure is used. A few points only will be noticed.

1293. The declaration should allege the seisin to be "in mortgage."[2] It should show that a foreclosure is desired, rather than possession for the purpose of taking the profits.[3] A judgment for possession at common law is entered unless a conditional judgment is asked for by one of the parties; and if the defendant be a stranger, or one not claiming under the mortgagor, the judgment will not be conditional except with the consent of the plaintiff.

1294. Answer. — Any specific matter of defence should be set up by answer. Under the general issue the defendant is not allowed to show that he was not in possession of the premises; or that they are subject to a mortgage previous or paramount to that held by the demandant; or that they are in possession of a third party, who has obtained a judgment for foreclosure upon that mortgage.[4]

1295. Evidence. — The demandant makes out a *primâ facie* case by providing the execution, delivery, acknowledgment, and recording of a mortgage made by a third person.[5] If the demandant holds the mortgage as assignee, he must also prove the execution and delivery of the assignment to himself, although this be not denied in the plea.[6] It is not necessary to show that the

[1] Varnum *v.* Abbot, 12 Mass. 474; Fosdick *v.* Gooding, 1 Me. 30, 50; Carll *v.* Butman, 7 Me. 102. According to a former practice the several tenants were joined as defendants. 4 Dane Abr. 192. This practice was corrected by Chief Justice Parsons, in Varnum *v.* Abbot, *supra;* and see Taylor *v.* Porter, 7 Mass. 355.

[2] G. S. of Mass. ch. 129, § 3; ch. 140, § 3. See Jackson on Real Actions, with Precedents.

[3] Fiedler *v.* Carpenter, 2 Wood. & M. 211; York Manuf. Co. *v.* Cutts, 18 Me. 204; Grant *v.* Galway, 122 Mass. 135. See, also, as to pleas by the defendant, Olney *v.* Adams, 7 Pick. 31; Wheelwright *v.* Freeman, 12 Met. 154; Richmond Iron Works *v.* Woodruff, 8 Gray, 447; Webster *v.* Vandeventer, 6 Gray, 428; Rochester *v.* Whitehouse, 15 N. H. 468; Little *v.* Riley, 43 N. H. 109.

[4] Amidown *v.* Peck, 11 Met. 467; Devens *v.* Bower, 6 Gray, 126.

[5] Burridge *v.* Fogg, 8 Cush. 183.

[6] Warner *v.* Brooks, 14 Gray, 109.

mortgagor owned the land; he cannot dispute the mortgagee's title. On the production of a note signed by a husband and wife, with a mortgage to secure it assented to by the husband, it is not necessary to show that she owned the land in her own right.[1]

The note or bond secured by the mortgage should be produced, although only incidentally in question. If lost, the contents may be proved, for the purpose of showing the amount for which conditional judgment shall be entered.[2] If the bond offered in evidence does not correspond to that described in the mortgage in amount or date, the variance may be explained by parol evidence.[3] A breach of the condition must of course be shown.

V. *The Defences.*

1296. Equitable defences are allowed. As already noticed, a writ of entry, as used in Massachusetts and Maine, for the foreclosure of a mortgage, is in effect a suit in equity rather than a real action at law, inasmuch as the plaintiff is entitled only to a conditional judgment.[4] As regards the defences that may be taken from the nature of the proceedings, these may be equitable as well as legal, unless the defendant sets up some title other than that of mortgagor. In that case his claim of prior independent title is tried and decided as in the ordinary action by this writ. Otherwise the suit, so far as regards the amount of the judgment and the conditional form of it, very much resembles a bill in equity when used for the same purpose. "The principal difference between the process in this point of view and the proceedings for the like purpose in the English courts is, that here our statute fixes the time within which the defendant shall pay the sum found due on the mortgage, in order to prevent the foreclosure, instead of leaving it to be limited in such cases by the courts."[5] The amount for which the conditional judgment shall be entered "is to be ascertained according to equity and good conscience, and by the same rules as on a bill in chancery to re-

[1] American Mut. Life Ins. Co. *v.* Owen, 15 Gray, 491.

[2] Ward *v.* Gunn, 12 Allen, 81; Grimes *v.* Kimball, 3 Allen, 518; Andrews *v.* Hooper, 13 Mass. 472, 475.

[3] Baxter *v.* McIntire, 13 Gray, 168. See Edgell *v.* Stanford, 3 Vt. 202.

[4] See *supra*, § 1276. In Holbrook *v.* Bliss, 9 Allen, 69, the history of the law in this respect is given in a learned opinion by Judge Gray.

[5] Per Jackson, J., in Walcutt *v.* Spencer, 14 Mass. 409, 411; Jackson on Real Actions, 49; Davis *v.* Thompson, 118 Mass. 497; Cochran *v.* Goodell, Sup. Ct. Mass. Oct. 1881.

deem the same mortgage."[1] Such judgment, in fact, is conclusive evidence of the amount due on a subsequent bill to redeem the same mortgage.[2]

In general the same defences may be made to an action to foreclose a mortgage that may be made in an action upon the note or other evidence of debt secured by the mortgage, excepting only the defence of the statute of limitations;[3] for, as already seen, the remedy on the mortgage remains good after an action on the debt is barred.[4]

A married woman might show, in defence to an action upon a mortgage made by her, that it is void for want of her husband's assent, or a judge's approval as required by statute; but after a conditional judgment has been rendered in a suit in which she has appeared and pleaded, she would be estopped to set up such invalidity in a writ of entry by her against the mortgagee or his grantee.[5]

1297. Want of consideration is of course a good defence; for in such case there is nothing on which to found a conditional judgment,[6] and parol evidence is admissible to show that no debt ever existed between the parties to the mortgage.[7] The fact that such a mortgage was given for the purpose of defrauding the mortgagor's creditors does not prevent his taking advantage of the want of consideration. As regards such fraudulent purpose the mortgagee is in no better condition than the mortgagor, as he must have participated in it.[8] So the fact that the note and mortgage were originally obtained by duress and fraud may be shown; or that the consideration was illegal.[9] A *bonâ fide* assignee of the note and mortgage before maturity might in such cases, on the general principles applicable to negotiable paper, recover when the original mortgagee or an assignee after default could not.[10]

[1] Per Gray, J., in Holbrook *v.* Bliss, 9 Allen, 69. See, also, Freeland *v.* Freeland, 102 Mass. 475.

[2] Sparhawk *v.* Wills, 5 Gray, 423, 427.

[3] Vinton *v.* King, 4 Allen, 562; Brolley *v.* Lapham, 13 Gray, 294, 297; Davis *v.* Bean, 114 Mass. 360; Hannan *v.* Hannan, 123 Mass. 441; Minot *v.* Sawyer, 8 Allen, 78; Northy *v.* Northy, 45 N. H. 141; Ladd *v.* Putnam (Me.), 12 Atl. Rep. 628. See § **610**.

[4] See §§ **1204, 1205**; Thayer *v.* Mann, 19 Pick. 535.

[5] Freison *v.* Bates College, 128 Mass. 464.

[6] Wearse *v.* Peirce, 24 Pick. 141; Freeland *v.* Freeland, *supra;* Hannan *v.* Hannan, *supra.* See § **612**.

[7] Hannan *v.* Hannan, *supra.*

[8] Wearse *v.* Peirce, *supra.* See § **619**.

[9] Vinton *v.* King, *supra.* See §§ **624, 626**.

[10] Clark *v.* Pease, 41 N. H. 414. See § **834**.

1298. Payment of the mortgage debt, although not made till after breach of the condition, is of course a defence to a writ of entry to foreclose the mortgage. The receipt of payment is a waiver of the breach of condition. The mere legal estate is not sufficient to support the action, because after the debt is paid there can be no conditional judgment.[1] But the fact that no money is due upon the mortgage constitutes no defence, if the condition be to do any other act, such as to provide support, and this has not been performed.[2] After payment the writ cannot be maintained even against a third person, and at the request of the mortgagor by whom the payment has been made.[3] The debt is not discharged by a tender made after condition broken and before the action was brought; it is only in equity that the mortgagor can avail himself of it. Therefore a tender after condition broken, if it be not accepted, constitutes no good defence to the action.[4]

It does not concern the defendant whether the plaintiff is prosecuting the foreclosure suit for his own benefit or for the benefit of another, unless in the latter case payment in whole or in part has been made to the person equitably interested; for such payment would be a defence. Otherwise the plaintiff, though not beneficially interested, is entitled to recover on his legal title.[5]

The mortgage is not extinguished by an assignment of it to an attaching creditor of the mortgagor to hold instead of the attachment, though the mortgagor procures the assignment by paying the mortgagee a sum equal to the amount due on the mortgage; and though for a temporary purpose it is reassigned to the mortgagee and afterwards assigned back again by him, it may still be enforced.[6]

[1] Vose *v.* Handy, 2 Me. 322; Slayton *v.* McIntyre, 11 Gray, 271; Burke *v.* Miller, 4 Gray, 114, 116; Wearse *v.* Peirce, 24 Pick. 141, 144; Wade *v.* Howard, 11 Pick. 289, 297; and see Chadbourne *v.* Rackliff, 30 Me. 354. "When the debt is paid, the whole substantial purpose is accomplished; a mere naked seisin, without any beneficial interest, remains in the mortgagee; the legal seisin which he holds results from the application of a strict technical rule of law, and any technical answer to a claim thus formed is good." The case of Parsons *v.* Welles, 17 Mass. 419, so far as it asserts that a writ of entry may be maintained on the mortgagee's bare legal title, is overruled.

[2] Mason *v.* Mason, 67 Me. 546.

[3] Prescott *v.* Ellingwood, 23 Me. 345; and see Bailey *v.* Metcalf, 6 N. H. 156.

[4] See §§ **886–892**; Maynard *v.* Hunt, 5 Pick. 240; Stanley *v.* Kempton, 59 Me. 472.

[5] Sanderson *v.* Edwards, 111 Mass. 335.

[6] Sheddy *v.* Geran, 113 Mass. 378.

1299. **Surrender obtained by fraud.** — If the mortgage has not in fact been paid or discharged, but delivered up to the mortgagor together with the note which it was given to secure, the action may still be maintained on proof that the delivery of these securities was obtained through the fraud of the mortgagor, in falsely representing that another note and mortgage which he gave the mortgagee in exchange were good and sufficient, when in fact they were worthless.[1] In such case the action may be maintained not only against the mortgagor, but also against one who has purchased from him in ignorance of this transaction between him and the mortgagee, and has paid the purchase money partly to the mortgagor and partly by taking up a subsequent mortgage; because, the mortgage remaining undischarged of record, the purchaser had constructive notice that it was still in force as an existing incumbrance, and having such notice he cannot insist that in equity his claim shall prevail over the legal title of the mortgagee.[2]

1300. **Usury** may be relied upon in defence to the foreclosure suit, in the same manner and to the same extent as in a suit upon the mortgage note.[3] But it must be pleaded and cannot be set up under the general issue.[4] The mortgagee will, however, be entitled to a conditional judgment unless the legal penalties for the usury exceed the whole debt.[5] The penalties go to reduce the amount for which the conditional judgment will be rendered. If there be no usury in the original transaction, a payment subsequently made to the mortgagee of a sum over and above the interest due on the debt, in consideration of his forbearance for a time to enter upon the premises and foreclose the mortgage, is not usurious, and is not deducted from the amount of the debt in ascertaining the amount of the conditional judgment.[6]

1301. **That no right of action has accrued** is, of course, a defence to the action.[7]

1302. **A defence may be maintained as to a part of the premises,** by showing a valid release of the mortgage as to such part, though as to the remainder of the premises there be no defence.[8]

1303. **A purchaser subject to a mortgage cannot set up**

[1] Grimes *v.* Kimball, 3 Allen, 518.

[2] Grimes *v.* Kimball, 8 Allen, 153.

[3] Hart *v.* Goldsmith, 1 Allen, 145, 147; Minot *v.* Sawyer, 8 Allen, 78. See § 633.

[4] Little *v.* Riley, 43 N. H. 109; Briggs *v.* Sholes, 14 N. H. 262.

[5] Manahan *v.* Varnum, 11 Gray, 405.

[6] § 647; Drury *v.* Morse, 3 Allen, 445.

[7] Pettee *v.* Case, 11 Gray, 478.

[8] Wolcott *v.* Winchester, 15 Gray, 461.

fraud in obtaining the mortgage. If he holds the premises by a quitclaim deed from the mortgagor, he cannot defend an action to foreclose the mortgage by showing that the mortgagee obtained the mortgage by false and fraudulent representations to the mortgagor; nor can he for this reason claim a reduction of the amount for which the conditional judgment is to be entered. If any such claim exists it must be made by the mortgagor, as it does not pass to a purchaser from him by quitclaim deed;[1] though it seems that the former might confer upon the latter the right to question the validity of the mortgage.[2]

1304. That the mortgagee has verbally promised not to enforce the mortgage, or that the mortgagor should hold the land discharged of the mortgage, is no defence to the action;[3] and a court of equity will not restrain the prosecution of it. A legal instrument under seal cannot be set aside by such a verbal agreement.[4] Moreover, after a suit to foreclose a mortgage has been instituted, the prosecution of it will not be enjoined, although the holder of the equity of redemption offers to pay any sum that may be due under the mortgage, for that may just as well be determined in the foreclosure suit.[5]

1305. The defendant is not allowed to set up any title acquired by him after the commencement of the action; as, for instance, the tenant cannot defeat an action by the holder of a second mortgage by obtaining an assignment of the first mortgage to himself, and offering by means of this to show a superior title.[6] But the defendant may set up a superior title acquired before the commencement of the action, and the title may be tried as in a common law writ of entry; and if such title is older and better than the mortgage title, he will prevail in the suit. If, instead of acquiring such outstanding title, a stranger holding it, pending the suit, ousts him or recovers the land against him, the writ will abate if the facts are specially pleaded.[7]

[1] §§ 744, 1807; Fairfield *v.* McArthur, 15 Gray, 526; Foster *v.* Wightman, 123 Mass. 100.

[2] Bennett *v.* Bates, 94 N. Y. 354.

[3] Maynard *v.* Hunt, 5 Pick. 240; and see Brolley *v.* Lapham, 13 Gray, 294.

[4] Hunt *v.* Maynard, 6 Pick 489.

[5] Kilborn *v.* Robbins, 8 Allen, 466.

[6] Hall *v.* Bell, 6 Met. 431; Nash *v.* Spofford, 10 Met. 192; and see Den *v.* Vanness, 10 N. J. L. (5 Halst.) 102. Per Jackson, J., in Walcutt *v.* Spencer, 14 Mass. 409, 411.

[7] Walcutt *v.* Spencer, *supra.* See, however, Dorr *v.* Leach, 58 N. H. 18.

VI. *The Conditional Judgment.*

1306. The judgment, after determining the amount due on the mortgage, is conditioned that if the defendant shall pay to the plaintiff the sum so adjudged to be due, with interest thereon, within two months from the time of entering it, then the mortgage shall be void and discharged; otherwise the plaintiff shall have his execution for possession. Possession gained in this way has the same effect as an entry *in pais* in the manner already described, and if continued for three years the right of redemption at the end of that period is forever foreclosed. In such case the time limited begins to run from the date when the officer delivers seisin and possession upon the execution. The officer's return on the execution is not conclusive as to the actual date of the delivery of possession. Where it appeared that the execution was dated May 6, 1869; and the officer's return and the acknowledgment of possession were dated May 3, 1869; and the execution was recorded June 10, 1869, it was apparent from the papers themselves that June 3 was the date intended; but the court held that whether this was so or not, the whole record showed that possession was actually taken on some day between the date of the execution and the date of the record of it, and for the purposes of the case this was all that it was necessary to determine.[1] Evidence aside from the record might be resorted to when necessary, to show when the possession actually began. A voluntary surrender of the premises after judgment of foreclosure does not give possession under the judgment, but merely ordinary peaceable possession under the mortgage. Possession under the judgment can only be delivered on the execution.[2]

In Massachusetts the execution and the officer's return thereon must be recorded in the registry of deeds, in order that the three years necessary for foreclosure shall run from the time of the delivery of seisin, as against any person other than the parties to the action and their heirs and devisees, and those having actual notice.[3]

The judgment will include the entire mortgaged land, although

[1] Worthy *v.* Warner, 119 Mass. 550; Dooley *v.* Potter, 140 Mass. 49, per Devens, J.

[2] Briggs *v.* Sholes, 14 N. H. 262.

[3] G. S. ch. 133, § 55; Robbins *v.* Rice, 7 Gray, 202.

In **Maine** there may be two distinct judgments; one based upon the title, the other as to the amount due. Ladd *v.* Putnam, 12 Atl. Rep. 628.

as to part of it the tenants have a right of redemption. Their remedy for this is by a bill in equity.[1]

1307. The fact that the demandant in a writ of entry is a mortgagee does not preclude him from maintaining the action simply to try his title, and to recover possession from one who has disseised him. When the controversy is between a mortgagee in possession and a stranger to the title who has disseised him, the statutory provision that the mortgagee shall count on his own seisin in mortgage has no application. Although he has entered to foreclose his mortgage, he may recover in a writ of entry just as if he were the absolute owner in fee.[2] He is not limited to a conditional judgment except in case he prosecutes the action for the purpose of foreclosing the mortgage.[3] If neither party moves for a conditional judgment, judgment will be entered in the common form.[4] The mortgagee, being already in possession of a portion of the mortgaged premises, may maintain a writ of entry against the mortgagor for the remainder, by declaring on his own seisin, without naming the mortgage or asking a judgment as upon a mortgage; and the defendant cannot restrict him to such a judgment, or object that the plaintiff is attempting to foreclose a part only of the mortgaged land.[5] Whether the writ of entry is brought for the foreclosure of the mortgage, or to try the title and recover possession, depends upon the case disclosed by the pleadings and proof, and not upon the form of the writ.[6]

1308. To obtain a conditional judgment the plaintiff must produce the bond or note on which the mortgage is founded, so that it may be known what payments have been made, and how much is due in equity and good conscience upon the debt. If the mortgagee has assigned the bond or note, and has no interest in the claim, there is no reason why he should have any judgment, although he has never assigned the mortgage. The judgment should only be rendered upon the request of the holder of the note or bond, and upon his producing it.[7]

[1] Lewis *v.* Babb, 15 Mass. 488, note; Johnson *v.* Brown, 31 N. H. 405.

[2] Simpson *v.* Dix, 131 Mass. 179.

[3] Boston Bank *v.* Reed, 8 Pick. 459; Haven *v.* Adams, 4 Allen, 80, 93; Stewart *v.* Davis, 63 Me. 539; Partridge *v.* Gordon, 15 Mass. 486; Darling *v.* Chapman, 14 Mass. 101; Loud *v.* Lane, 8 Met. 517; Somes *v.* Skinner, 16 Mass. 348; *S. C.* 3 Pick. 52.

[4] Provident Inst. for Savings *v.* Burnham, 128 Mass. 458.

[5] Treat *v.* Pierce, 53 Me. 71; and see R. S. of Me. ch. 90, § 7.

[6] Blanchard *v.* Kimball, 13 Met. 300.

[7] Vose *v.* Handy, 2 Me. 322, 332; Ble-

1309. The judgment should include the whole amount due and payable on the mortgage at the time of entering the judgment, and not merely the amount due at the commencement of the action.[1] It should include the whole amount secured by the mortgage, whether the debt be absolute or contingent, and evidence is admissible to show what is the actual amount secured.[2] It should include the costs in a judgment previously obtained upon the mortgage debt, as well as the costs in the action upon the mortgage.[3] Neither is the judgment limited to the amount of the penalty of a bond which the mortgage secures.[4]

The judgment is not conclusive of the amount due on the mortgage, as against one who has purchased the equity of redemption before the bringing of the writ of entry and is not a party to the action, on a bill by him to redeem the land.[5]

1310. When the condition of the mortgage is not for payment of a sum of money, but is for the performance of various duties from time to time other than the payment of money, a simple conditional judgment in the usual form is not all that is necessary; but any decree which may be made in a suit in equity may be entered from time to time, and as often as necessary, in order to accomplish the purpose of the mortgage.[6]

In such case the court may liquidate the amount due upon the mortgage;[7] as where it is conditioned for the support of the mortgagee, judgment may be entered for the amount of expense incurred by him in consequence of the breach of the condition up to the time of rendering judgment.[8] A mortgage provided that the mortgagor should keep a cow for the mortgagee; but he kept it so poorly that the mortgagee was obliged to sell the cow. In an action to foreclose the mortgage, a conditional judgment was entered for the cost of keeping a cow subsequent to the time of the sale. The mortgagor not having offered to keep another cow, or give any assurance that he would keep one properly, it was not regarded as necessary that the mortgagee should purchase a cow

then *v.* Dwinal, 35 Me. 556; Powers *v.* Patten, 71 Me. 583, 586. And see George *v.* Ludlow (Mich.), 33 N. W. Rep. 169.

[1] Northy *v.* Northy, 45 N. H. 141; Stewart *v.* Clark, 11 Met. 384; Mohn *v.* Hiester, 6 Watts (Pa.), 53; Carpenter *v.* Carpenter, 6 R. I. 542.

[2] Freeland *v.* Freeland, 102 Mass. 475.

[3] Holmes *v.* French, 70 Me. 341; Hurd *v.* Coleman, 42 Me. 182; Rawson *v.* Hall, 56 Me. 142.

[4] Pitts *v.* Tilden, 2 Mass. 118.

[5] Dooley *v.* Potter, 140 Mass. 49. To hold him concluded by such action would be against first principles.

[6] Stewart *v.* Clark, 11 Met. 384.

[7] Erskine *v.* Townsend, 2 Mass. 493.

[8] Wilder *v.* Whittemore, 15 Mass. 262.

and ask the mortgagor to keep her, in order to hold him liable for the keeping.[1]

Questions of fact as to the amount due may be submitted to a jury.[2] Special issues may be framed and questions proposed for this purpose, to be tried and determined by the jury under the direction of court.[3]

1311. Payments made by the mortgagee for protection of the estate, he is entitled to have included in the judgment; as, for instance, any sums he has paid for taxes, premiums of insurance, or in other ways for the benefit of the mortgagor, so far as the mortgage provides that such payments shall become a charge upon the estate.[4] But a mortgagee who has taken his mortgage in part payment of the purchase money of premises conveyed by him to the mortgagor at the same time, by a deed with full covenants of warranty, cannot charge the mortgagor with a sum since paid by him to relieve the premises from a prior mortgage made by him while owner in fee of the premises, by proof of an oral agreement at the time of making the conveyances that the mortgagor should assume the payment of the prior mortgage, and of a mistake in the drawing of the deeds. The written deed must be taken as proof of the agreement of the parties. The mortgagee can avail himself of such agreement and mistake only by a bill in equity to reform the deed.[5]

1312. Indemnity mortgage. — Where the condition of a mortgage is that the mortgagor shall pay such notes as the mortgagee shall sign for his accommodation, and also a promissory note described in the mortgage, but the only consideration for the mortgage and mortgage note is the signing of an accommodation note which the mortgagee paid at maturity, on a writ of entry to foreclose, the conditional judgment should be for the amount of the note paid by the mortgagee with legal interest from the time of payment; and even if the mortgage note and the accommodation note be for the same amount, the transaction cannot be regarded as a loan of that amount, or the mortgage note regarded as the principal debt, so as to carry a higher rate of interest made payable by that note.[6] If after an indemnity mortgage is given

[1] Fiske *v.* Fiske, 20 Pick. 499.

[2] Slayton *v.* McIntyre, 11 Gray, 271, 275.

[3] Foss *v.* Hildreth, 10 Allen, 76.

[4] See § **1080.**

[5] Ruggles *v.* Barton, 16 Gray, 151.

[6] Athol Savings Bank *v.* Pomroy, 115 Mass. 573.

the parties themselves agree upon the amount of the liability, the judgment will be for this amount, though it be only a part of the original claim.[1]

1313. In ascertaining the amount of the judgment, claims in set-off may be allowed if they are actually mutual, or if the parties have agreed to offset them.[2] Accordingly where the holder of a mortgage was indebted to the mortgagor, and orally agreed with him that he should have the mortgage for the amount of the debt, it was held that the debt should be offset against the mortgage, although such holder had assigned it to another person upon a secret trust to hold for him.[3] But distinct debts cannot be set off aside from any agreement of the parties. The question is not what would be due between the parties upon a settlement of their mutual demands, but what is due on the mortgage.[4] If there are counter-claims, which by agreement have become an equitable set-off, they should be proved at the trial. Merely presenting the claims without proof on the one side, or admission upon the other, avails nothing.[5]

1314. Joint-tenants. — If two persons owning land as tenants in common mortgage it to secure the payment of a debt, equitably as well as legally due from both, and one is made to pay the whole debt, he, by reason of such payment, becomes an equitable assignee of the mortgage until the other mortgagor contributes his share, and the mortgagee may be compelled in equity to execute an assignment to him.[6] If after such a mortgage one tenant makes a second mortgage of his undivided half of the same property to secure his own debt to the same mortgagee, who, after entering to foreclose under this mortgage, brings a writ of entry against the other tenant to foreclose the first mortgage, the conditional judgment should be for one half of the joint debt; for if this tenant were compelled to pay the whole debt, he would be entitled to the security, and, the mortgagee having taken possession of one undivided moiety under the second mortgage, the result is the same in the end: the mortgagee has the benefit of all the security, and circuity of action is avoided.[7] If the money raised by the first mortgage had been for the benefit of one debtor alone, the conditional judgment against him would be for the

[1] Rice *v.* Clark, 10 Met. 500.

[2] Slayton *v.* McIntyre, 11 Gray, 271.

[3] Holbrook *v.* Bliss, 9 Allen, 69; Davis *v.* Thompson, 118 Mass. 497.

[4] Bird *v.* Gill, 12 Gray, 60.

[5] Davis *v.* Thompson, *supra.*

[6] Sargent M'Farland, 8 Pick. 500.

[7] Sargent *v.* M'Farland, *supra.*

whole debt, because he would not then be entitled to any protection from the security.

1315. If nothing is due to the plaintiff upon the mortgage he is not entitled to any judgment at all, although by reason that the mortgage debt was paid after it became due there has been a breach of the condition, and the technical legal title is still in the mortgagee.[1]

1316. The judgment, with all benefit of the security and of the possession taken under it, may be assigned. If the mortgage be formally assigned, the assignee takes the legal title; if only the judgment be assigned, he takes the equitable title; but in either case he has the benefit of all the proceedings taken towards the foreclosure of the mortgage. If the assignment be made to a surety, or any person other than the owner of the equity who pays the judgment, the payment does not avail such owner as a payment of the mortgage debt. Even without any formal assignment either of the judgment or of the mortgage, the surety would be equitably subrogated to all benefit of both.[2]

[1] Slayton *v.* McIntyre, 11 Gray, 271.

[2] Worthy *v.* Warner, 119 Mass. 550. See, also, Hedge *v.* Holmes, 10 Pick. 380.

CHAPTER XXX.

STATUTORY PROVISIONS RELATING TO FORECLOSURE AND REDEMPTION, 1317-1366.

1317. The statutes generally. — An examination of the statutes of the several states in relation to the foreclosure of mortgages can hardly fail to surprise one at the great diversity of systems in use, and at the difference in detail between those which are based upon the same general principles.[1] In general it may be said that a bill in equity for the foreclosure and sale of the property is the prevailing method. But in some states this proceeding is left to the inherent and general jurisdiction of courts of chancery, without any statutory regulations whatever. Formerly the general principles of equity were considered sufficient for conducting and determining the suit in all cases, and there were statutes regulating it in hardly any of the states. Gradually, however, the different states have enacted provisions covering the whole proceeding of foreclosure, so that now this is wholly left to the general equitable jurisdiction and discretion of the courts in chancery only in one state where the common mode of foreclosure is by bill in equity; though in several other states, as in Massachusetts and Pennsylvania, where a foreclosure in equity is allowed only in exceptional cases when the modes in common use are inadequate, the proceedings are under the general equitable jurisdiction of the court. The statutes in some states still leave much to the equitable discretion of the court; while in others such discretion is altogether supplanted by provisions which cover the whole subject in detail.

Aside from the provisions relating directly to the mode of foreclosure, and the rights of the parties before and after foreclosure is effected, a fundamental change has been made in the manner

[1] This subject well illustrates the need and use of a legal reform which shall have for its object a system of jurisprudence which shall be, if not uniform, at least an approach to uniformity, throughout the United States. See article by P. N. Bowman, in 3 Southern L. Rev. 573, on Inter-State Revision and Codification.

of judicial procedure in several states, which should be kept in mind in examining the statutes and decisions of these states upon this subject.

1318. Codes of procedure. — The State of New York, in 1848, adopted a code of procedure, the fundamental principle of which is contained in the provision, that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action."[1] The Code does not abolish the distinction between law and equity, which is too deeply impressed upon the jurisprudence of the country to be done away with in any state by any enactment. The civil action is an equitable proceeding, where formerly it would have been a bill in equity. The action for foreclosure under the Code is an equitable proceeding as distinguished from an ordinary one, and is governed by the established principles of equity except where statutes regulate it; and these statutes in general are only embodiments of established principles of equity. So, therefore, foreclosure remains an equitable remedy, although it is obtained under a new name and form. This provision of the New York Code quoted above as comprehending the whole system has been enacted, generally in the same words, in Ohio,[2] Indiana,[3] Wisconsin,[4] Iowa,[5] Minnesota,[6] Missouri,[7] Kansas,[8] Nebraska,[9] Nevada,[10] Oregon,[11] California,[12] Kentucky,[13] North Carolina,[14] South Carolina,[15] and Florida.[16]

1319. In this chapter a statement will be given of the statutory provisions of each state in relation to the foreclosure and redemption of mortgages, excepting only such provisions as relate to power of sale mortgages, and trust deeds with powers of sale in the nature of mortgages, and the provisions relating to foreclosure by entry and possession used in some of the New England

[1] 3 R. S. 1875, p. 473; Code, § 69.

[2] Code of Civil Proced. 1874, p. 2; and R. S. 1860, ch. 87, § 3.

[3] St. 1862, Gavin & Hord, vol. 2, p. 33, § 1; R. S. 1876, vol. 2, p. 32.

[4] R. S. 1871, ch. 122, § 8.

[5] R. S. 1873, §§ 2507–2520.

[6] R. S. 1866, ch. 66, § 1.

[7] Wagner's Stat. 1870, ch. 110, art. 1, § 1.

[8] G. S. 1868 (Dassler, 1876), ch. 80, § 10.

[9] G. S. 1873, ch. 57, § 2.

[10] Compiled Laws 1873, § 1064.

[11] G. Laws 1872, p. 105.

[12] Code 1872; Civil Procedure, p. 81.

[13] Code 1867, p. 2, §§ 1–13.

[14] Battle's Rev. 1873, p. 137; Constitution, § 1, art. 14.

[15] R. S. 1873, p. 597.

[16] Bush, Dig. of Stat. 1872, p. 457.

States. Frequently, where the mode and form of proceedings to foreclose are not regulated by statute, these are stated upon the authority of the decisions of the courts. In the notes are given the judicial interpretations of the more important provisions of these statutes, and especially such decisions as illustrate the local laws rather than general principles everywhere applicable.

1320. A mortgage cannot be foreclosed by a special statute enacting that the mortgage has been foreclosed, or that it shall be foreclosed in case the debt be not paid within one year from the passage of the act.[1] Such a statute would be in substance and effect a judicial decree. It is not properly a legislative act. It is, therefore, unconstitutional under a government in which the legislative and judicial powers are vested in different bodies, and also in violation of the Constitution of the United States, as impairing the obligation of the contract between the parties to the mortgage, whereby the mortgagor had the right to redeem according to the general laws of the state.

1321. The law in force when the mortgage was executed must be followed in foreclosing it, though there be a change in the mean time. The remedy so provided becomes a part of the contract of the parties, and any change by statute substantially affecting it, to the injury of the mortgagee, is held to be a law impairing "the obligation of the contract," within the meaning of the Constitution of the United States. Thus a law which provided that the equitable estate of the mortgagor should not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale unless two thirds of the amount at which the property has been valued by appraisers shall be bid therefor, cannot be applied in the foreclosure of a mortgage executed before the statute was enacted; but such mortgage must be foreclosed according to the law existing when it was executed.[2]

1322. Alabama. — Foreclosure is by bill in equity.[3] The de-

[1] Ashuelot R. R. Co. *v.* Elliot, 52 N. H. 387; Martin *v.* Somerville Water Power Co. 27 How. (N. Y.) Pr. 161.

[2] Bronson *v.* Kinzie, 1 How. 311; Williamson *v.* Doe, 7 Blackf. (Ind.) 12; McCracken *v.* Hayward, 2 How. 608; Clark *v.* Reyburn, 8 Wall. 318, 322; Ogden *v.* Walters, 12 Kans. 282. See Dow *v.* Chamberlin, 5 McLean, 281. In **Wisconsin,** however, a statute providing that in foreclosure suits the defendant shall have six months to answer, and that there should be six months' notice of the sale after judgment, was held constitutional; Von Baumbach *v.* Bade, 9 Wis. 559; Starkweather *v.* Hawes, 10 Wis. 125; but not applicable to pending actions. Ogden *v.* Glidden, 9 Wis. 46; Diedricks *v.* Stronach, 9 Wis. 548.

[3] Code 1886, §§ 1879–1891. Power of

cree has the force and effect of a judgment, and execution may issue after the property has been sold, the sale confirmed, and the balance ascertained by decree of court. Before so provided by statute it was held that the balance of the debt could only be enforced at law.[1] The proceeding is one not *in rem* but *in personam*, and those who are not parties to it are not bound by the decree.[2] A strict foreclosure may be decreed in proper cases, as where a mortgagee has obtained a release of the equity of redemption of property which is worth nothing above the debt, and he desires to quiet the title.[3]

The fact that a power of sale is conferred upon the mortgagee does not deprive a court of chancery of its jurisdiction to foreclose. The fact that he is incapable of purchasing at his own sale is a reason why this jurisdiction should be retained.[4]

When real estate is sold under a decree in chancery, deed of trust, or power of sale in a mortgage, it may be redeemed within two years. The possession of the land is given to the purchaser within ten days after the sale by the debtor, if in his possession, on demand of the purchaser. If the land is in the possession of a tenant, notice to him by the purchaser, or his vendee, of the purchase, after the lapse of ten days from the time of sale, vests the right of possession in him in the same manner as if such tenant had attorned to him. The debtor in order to redeem must pay the purchase money, with interest at the rate of ten per cent. per annum, and all lawful charges. If the purchaser refuses to restore possession to the debtor, the latter may recover possession by suit for unlawful detainer. Judgment creditors may redeem in like manner, upon further offering to credit the debtor upon a subsisting judgment with at least ten per cent. of the amount originally bid for the land. If the purchaser offers to credit the debtor on his judgment a like amount he may retain the land, unless the creditor makes a further offer to credit an additional sum of not less than ten per cent. as before, to which the purchaser may respond, if he choose, with a like offer. One judgment creditor may in like manner redeem from another. Any person redeem-

sale mortgages are now in common use. See § 1723.

[1] Hunt *v.* Lewin, 4 Stew. & P. 138.

[2] Hunt *v.* Acre, 28 Ala. 580; Boykin *v.* Rain, 28 Ala. 332; Duval *v.* McLoskey, 1 Ala. 708.

[3] Hitchcock *v.* U. S. Bank of Penn. 7 Ala. 386.

[4] Carradine *v.* O'Connor, 21 Ala. 573; Marriott *v.* Givens, 8 Ala. 694; McGowan *v.* Branch Bank at Mobile, 7 Ala. 823; Ala. Life Ins. & Trust Co. *v.* Pettway, 24 Ala. 544.

ing must pay to the person in possession the value of all permanent improvements made by him after he acquired title.[1]

1322 *a*. Arizona Territory.[2] — The judgment for foreclosure is that the plaintiff recover his debt and costs with a foreclosure of his lien, and that an order of sale shall issue to the sheriff or any constable of the county directing a sale as under execution, and to satisfy any balance remaining unpaid out of other property. If the debt for which the mortgage, lien, or incumbrance is held be not all due, so soon as sufficient of the property has been sold to pay the amount due with costs, the sale must cease; and afterward, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale. The court may by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon, or after a sale on execution, before a conveyance.

All mortgages of real or personal property with powers of sale in the mortgagees, and all deeds of trust in the nature of mortgages, may, at the option of the mortgagees or *cestui que trusts*, be foreclosed in the proper courts and the property sold in the same manner in all respects as in case of ordinary mortgages.

[1] Code 1876, §§ 2877–2887; Cramer *v.* Watson, 73 Ala. 127.

The right to redeem after a sale can be enforced only in equity. A tender does not restore the title. Smith *v.* Anders, 21 Ala. 782.

This right to redeem is a personal privilege of the debtor, and cannot be asserted by a purchaser of his interest at an execution sale before the statutory right had arisen. Childress *v.* Monette, 54 Ala. 317. The statutory right of redemption can only be exercised by the persons named in the statute, and not by an assignee of the equity of redemption. The statutory right of redemption comes into existence only after the equity of redemption proper has been cut off by sale or foreclosure. Powers *v.* Andrews, 4 So. Rep. 263, overruling Bailey *v.* Timberlake, 74 Ala. 221.

The right cannot be waived by a contemporaneous agreement of the mortgagor. Parmer *v.* Parmer, 74 Ala. 285.

This right of redemption is neither property nor a right of property. Otis *v.* McMillan, 70 Ala. 46. It is not subject to levy and sale under execution. Junkins *v.* Lovelace, 72 Ala. 303; Bailey *v.* Timberlake, *supra*.

[2] R. S. 1887, §§ 797, 2358, 3155, 3156.

1323. Arkansas.[1] — Mortgages are foreclosed by complaint against the mortgagor and the actual occupants[2] of the real estate praying judgment for the debt, and that the equity of redemption may be foreclosed and the property sold. This must be filed in the county where the premises or some part of them are situate. The proceedings are of an equitable character, and are governed by the principles and practice of courts of equity.[3]

It is not necessary to enter an interlocutory judgment, or give time for the payment of money, or for doing any other act; but final judgment may be given in the first instance. A sale is ordered in all cases. Judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally.

All sales of real property are made on a credit of not less than three nor more than six months, or on instalments equivalent to not more than four months' credit on the whole, to be determined by the court.[4] In all sales on credit the purchaser must execute a bond, with a good surety to be approved by the person making the sale, which bond has the force of a judgment, and a lien is retained on the property for its price. If the mortgage be not satisfied by the sale, an execution may issue against the defendant as in ordinary judgments.[5]

[1] Dig. of Stat. 1884, §§ 5168–5172. For form of complaint, see p. 1276. Trust deeds are in use here. Equity has no jurisdiction of a proceeding *in rem* against real estate to foreclose a mortgage upon it, without making any person defendant. This could be authorized only by statute. State *v.* Bailey, 27 Ark. 473.

[2] The actual occupant, if there be one, must be made a party, or the petition must show that there is no occupant, or that the mortgagor is the occupant. McLain *v.* Smith, 4 Ark. 244; Jett *v.* Cave, 5 Ark. 254; Buckner *v.* Sessions, 27 Ark. 219, 225; Fletcher *v.* Hutchinson, 25 Ark. 30.

[3] McLain *v.* Smith, *supra;* Price *v.* State Bank, 14 Ark. 50.

[4] It is error in the court to direct a sale for cash. It is bad practice to appoint the mortgagee a commissioner to make the sale A disinterested person should be appointed. It is usual to appoint a master. Worsham *v.* Freeman, 34 Ark. 55.

[5] At all sales of real property under mortgages and deeds of trust, the property shall not be sold for less than two thirds of the appraised value thereof. If the property shall not sell at the first offering for two thirds of the amount of the appraisement, another offering may be made twelve months thereafter, at which offering the sale shall be to the highest bidder, without reference to the appraisement. Real property sold hereunder may be redeemed by the mortgagor at any time within one year from the sale thereof, by payment of the amount for which the property was sold, together with ten per cent. interest thereon and costs of sale. When such sales are to be made, the mortgagee, trustee, or other person authorized to make the same, shall, before the day fixed therefor, apply to the nearest justice of the peace for the appointment of

1324. California.[1] — Foreclosure is a matter of equity jurisdiction.[2] There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate.[3] In such action the court may by its judgment direct a sale of the incumbered property, or so much thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs and expenses of sale and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued.[4] Subsequent parties in interest not appearing of record need not be made parties to the action; and judgment is conclusive against them. Any surplus there may be the court may cause to be paid to the person entitled to it, and in the mean time may direct it to be deposited in court. When the debt is not all due, so soon as sufficient property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due for principal or interest, the court may on motion order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

The officer gives the purchaser a certificate of sale, stating the price bid, the whole price paid, and whether subject to redemption. Redemption may be made by the judgment debtor, or his

appraisers; and such justice shall thereupon appoint three disinterested householders of the county, who shall under oath proceed to view and appraise such property, and they, or any two of them, shall make a report of their appraisement in writing, and shall deliver it to the person making the sale, to be held by him subject to inspection by all parties interested. Dig. of Stat. 1884, §§ 4759–4761.

[1] Code of Civil Procedure, §§ 726–728.

[2] Willis *v.* Farley, 24 Cal. 490.

[3] Under this provision it was held that a mortgagee who had prosecuted an action in Ohio to final judgment, upon a note secured by mortgage on land in California, could not afterwards maintain an action for foreclosure. Ould *v.* Stoddard, 54 Cal. 613.

[4] As to form of judgment, see Leviston *v.* Swan, 33 Cal. 480. The personal judgment cannot be docketed before the sale. Cormerais *v.* Genella, 22 Cal. 116. It should first be ascertained by the court or by a master what balance is due. Hunt *v.* Dohrs, 39 Cal. 304; Guy *v.* Franklin, 5 Cal. 416. The clerk of court may then without further order docket the judgment and issue a general execution. Leviston *v.* Swan, *supra.*

successor in interest in the whole or any part of the property; or by a creditor having a lien by judgment or mortgage on the property or any part of it. Such creditors are called redemptioners. The judgment debtor or redemptioner may redeem within six months after the sale, on paying the purchaser the amount of his purchase, with two per cent. per month thereon in addition, with any taxes the purchaser may have paid; and if the purchaser be a creditor having a prior lien, the amount of such lien with interest.[1] If a redemptioner redeem, the judgment debtor or another redemptioner may, within sixty days after the last redemption, again redeem, on paying the sum paid on the last redemption with four per cent. thereon in addition.[2] And successive redemptions may be made in the same manner. If no redemption be made within six months after sale, the purchaser is entitled to a conveyance.

A purchaser from the time of sale, and a redemptioner till another redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation. The amount received must be credited on the redemption money to be paid.[3] If the purchaser be evicted for any irregularity in the sale, he may recover the amount of the purchase money with interest from the judgment creditor.[4]

When a personal judgment is rendered against the defendant, and also a decree in equity awarded for the sale of the property, the plaintiff may pursue either remedy, but he cannot use both at the same time. If he enforce the execution on the personal judgment first,[5] the money realized on it must be applied upon it, and a sale of the property under the decree made for the balance, or *vice versa*.[6] The personal judgment does not become a lien upon other real estate of the defendant until the mortgaged property has been sold, and the deficiency of the debt reported

[1] Code of Civil Procedure, § 702, and Amendment to Code of Civil Procedure, Feb. 13, 1876, p. 96. If the mortgagee purchases the land at the foreclosure sale for a sum less than the amount of the judgment, and takes judgment for the deficiency, the mortgagee's grantee, pending the time for redemption, is entitled as successor in interest to redeem the mortgage without paying the amount of the deficiency. The mortgagee, in such case, is not a creditor having a prior lien. Simpson *v.* Castle, 52 Cal. 644.

[2] Code, *supra*, § 703; Amendments, 1874, p. 323.

[3] Code, *supra*, § 707.

[4] Code, *supra*, § 708.

[5] If the plaintiff takes a personal judgment only, and strikes out the prayer for a sale of the premises, he waives all right to this. Ladd *v.* Ruggles, 23 Cal. 232.

[6] Englund *v.* Lewis, 25 Cal. 337.

and docketed by the clerk of the court.[1] It then applies only for this deficiency.[2]

When part of the debt is not due at the time of the decree, there can be no judgment for the recovery of the balance not due from the defendant. The decree should be so modified as to exclude the recovery of the part of the debt not due. The power of the court under the statute is exhausted by decreeing a sale of the entire property, though only part of the debt was due.[3] In all cases of foreclosure the attorney's fee is fixed by the court in which the proceedings are had, without reference to any stipulation in the mortgage.

1325. Colorado.[4] — Actions for the foreclosure of mortgages of real property must be tried in the county in which the subject of the action, or some part thereof, is situated, provided that, where such real property is situated partly in one county and partly in another, the plaintiff must bring his action in the county where the greater portion of such real estate is situate. The court has power, by its judgment, to direct a sale of the incumbered property, or so much as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court and expenses of the sale and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment is docketed for such balance against the defendant or defendants personally liable for the debt, and then becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued. No person holding a conveyance from or under the mortgagor, or of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear on record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to said action, and in all respects have the same force and effect. If the debt for which the mortgage, lien, or incumbrance is held be not all due, so soon as sufficient of the prop-

[1] Rowland *v.* Leiby, 34 Cal. 156; Rowe *v.* Table Mountain Water Co. 10 Cal. 441.

[2] Culver *v.* Rogers, 28 Cal. 520; Cormerais *v.* Genella, 22 Cal. 116.

[3] Taggart *v.* San Antonio Ridge Ditch & Mining Co. 18 Cal. 460.

[4] Code of Civil Procedure 1877, §§ 22, 229, 231, 244; amended by Laws of 1879, p. 223.

erty has been sold to pay the amount due with costs the sale must cease, and afterwards, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold.[1]

The court may by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon, or after a sale on execution before a conveyance.

1326. Connecticut.[2] — Mortgages are foreclosed in a court of chancery. The decree is for a strict foreclosure, whereby the title becomes absolute in the mortgagee, on the mortgagor's failure to redeem within the time limited by the decree, which is usually from two to six months. There can be no decree for the sale of the property.[3] The court may enforce a delivery of possession to the mortgagee after the time allowed for redemption has expired. Formerly a foreclosure did not preclude the mortgage creditor from recovering so much of the claim as the property mortgaged, estimated at the expiration of the time limited for redemption, is insufficient to satisfy; and the bringing of an action upon such claim after foreclosure obtained did not open the foreclosure.[4] The value of the property mortgaged, at the expiration of said time, was ascertained by the court before which the action was pending; and the creditor recovered only the difference between such value and the amount of his claim. But in 1878 it was provided that the foreclosure of a mortgage shall be a bar to any further suit or action upon the mortgage debt or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure.

Upon motion of any party to a foreclosure, the court appoints three disinterested appraisers, who shall, under oath, appraise the mortgaged property within ten days after the time limited for redemption shall have expired, and shall make written report of their appraisal to the clerk of the court where said foreclosure was

[1] The mortgagor, his heirs, executors, or administrators, may redeem the same in the manner prescribed for the redemption of lands sold by virtue of executions issued upon judgments at common law; and judgment creditors may redeem lands sold under any such decree, in the same manner as is prescribed for the redemption of lands in like manner sold upon executions issued upon judgments at common law. G. S. 1883, ch. 60, § 26.

[2] G. S. 1888, ch. 186, §§ 3010–3017.

[3] In Palmer *v.* Mead, 7 Conn. 149, 152, Chief Justice Hosmer spoke of a sale of the mortgaged premises on foreclosure as "a proceeding never admitted here."

[4] Previous to the statute, passed originally in 1833, there could be no suit for the balance without opening the foreclosure. M'Ewen *v.* Welles, 1 Root, 203.

had, which report shall be a part of the files of such foreclosure suit, and such appraisal shall be final and conclusive as to the value of said mortgaged property; and the mortgage creditor, in any further suit or action upon the mortgage debt, note, or obligation, shall recover only the difference between the value of the mortgaged property as fixed by such appraisal and the amount of his claim. When a mortgage has been foreclosed, and the time limited for redemption has passed, and the title to the premises has become absolute in the mortgage creditor, he must sign a certificate describing the premises, the deed of mortgage on which the foreclosure was had, the book and page of record, and the time when the title became absolute, which certificate must be recorded in the records of the town where the premises are situated.[1] When the mortgage has been assigned, the title to the premises, upon the expiration of the time limited for redemption and on failure to redeem, vests in the assignee, in the same manner and to the same extent as it would have vested in the mortgagee, provided the person so foreclosing shall forthwith cause the decree of foreclosure to be recorded in the records of the town where the land lies.

All mortgages executed after June 1, 1886, may, on the written motion of any party to the suit, be foreclosed by a decree of sale instead of a strict foreclosure, at the discretion of the court. When the court is of opinion that a foreclosure by sale should be decreed, it shall, in and by the judgment therein, appoint a person to make such sale and fix a day therefor, and shall direct whether the property shall be sold as a whole or in parcels, and how such sale shall be made and advertised; but in all cases in which such a sale is ordered the court shall appoint three disinterested persons who shall, under oath, appraise the property to be sold and make return of their appraisal to the clerk of the court; and the ex-

[1] The certificate shall be substantially in the form following: To all whom it may concern. This certifies that a mortgage from , of the town of , county of , in the state of , to , of the town of , county of and State of , bearing date the day of A. D. , and recorded in the land records of the town of , book , page , was foreclosed upon the complaint of against , the owner of the equity of redemption in said mortgaged premises, and against , having an interest therein, in the court held at , within and for the county of and the State of Connecticut, on the day of , A. D. . The premises are described as follows, viz.: . The time limited for redemption in said judgment of foreclosure has passed, and the title to said premises became absolute in the said on the day of , A. D. .

pense of such appraisal shall be paid by the plaintiff and be taxed with the costs of the case. If after the judgment the amount found to be due, together with the interest and the costs, shall be paid to the plaintiff before the sale, all further proceedings in the suit shall be stayed.

When a sale has been made pursuant to a judgment therefor, a conveyance of the property sold shall be executed by the person appointed to make the sale, which conveyance shall vest in the purchaser the same estate that would have vested in the mortgagee or lien-holder if the mortgage or lien had been foreclosed by strict foreclosure, and to this extent said conveyance shall be valid against all parties to the cause and their privies, but against no other persons, and the court may order possession of the property sold to be delivered to the purchaser. The proceeds of every such sale shall be brought into court, there to be applied, if the sale be ratified, in accordance with the provisions of a supplemental judgment then to be rendered in said cause, specifying the parties who are entitled to the same, and the amount to which each is entitled; and if any part of the debt or obligation secured by the mortgage or lien foreclosed, or by any subsequent mortgage or lien, was not payable at the date of the judgment of foreclosure, it shall nevertheless be paid as far as may be out of the proceeds aforesaid as if due and payable, with rebate of interest, however, where such debt was payable without interest.[1]

1327. Dakota Territory.[2] — Foreclosure is by an equitable suit in accordance with the Code. The action must be brought in the district court of the county where the premises or some part of them are situated; judgment may be rendered for the amount of the debt against the mortgagor, and a decree may be made for the sale of the premises, or of such part as may be sufficient to pay the amount of the judgment. The court may order and compel the delivery of the possession of the premises to the purchaser after the expiration of one year from the sale, and may direct an execution to issue for the balance remaining unsatisfied. While this action is pending, no proceedings at law can be had for the recovery of the debt or any part of it unless authorized by the court. If any person other than the mortgagor is liable for the debt, a judgment for the balance remaining unsatisfied after the sale may be entered against him as well as the mortgagor, and may be enforced by execution or other process.

[1] G. S. 1888, §§ 3023-3027.

[2] Code of Civ. Pro. 1883, §§ 616-634.

The complainant must state in his complaint whether any proceedings have been had at law or otherwise for the recovery of the debt; and if any execution has been issued for any part of the debt, the proceedings cannot go on unless the execution be returned unsatisfied in whole or in part; and that the defendant has no property whereon to satisfy it, except the mortgaged premises.

Sales under a decree of foreclosure are made by a referee, sheriff, or deputy sheriff of the county, or other person appointed by the court, in the county or subdivision of it where the premises or some part of them are situated. The officer making the sale must give to the purchaser a certificate in writing, setting forth the sum paid and the time when the purchaser will be entitled to a deed, unless redeemed; and if the premises are not redeemed within one year from the time of sale, he executes a deed to the purchaser. Redemption within that time may be made by paying the purchaser the sum for which the premises were sold, with interest at the rate of ten per cent. per annum. The proceeds of the sale are applied to the payment of the debt, and any surplus there may be is brought into court for the use of the persons entitled to it.

When the action is brought for an instalment of the debt or of the interest, and other instalments are not then due, the bill is dismissed upon payment at any time before the decree of sale of the principal and interest due, with costs. If, after a decree of sale, the money is brought into court, the proceedings are stayed until a further default, in case of which the court may enforce the collection of such subsequent instalment. The court may direct a reference to a master to ascertain whether the premises shall be sold in parcels or together, and may direct the sale to be made accordingly. If it appears that a sale of the whole together will be most beneficial to the parties, the decree may be in the first instance entered for the sale of the whole. In that case the proceeds are applied to the payment as well of the part of the debt already due as that which is not then due; and if the residue which is not then payable does not bear interest, a proper rebate of interest is made.[1]

1328. **Delaware.**[2] — Foreclosure is by *scire facias*. Upon

[1] Redemption may be made as provided in case of foreclosure by advertisement. § 1728.

[2] R. Code 1874, p. 687. A court of chancery also has jurisdiction of a bill to foreclose a mortgage. Giles *v.* Lewis, 4 Del. Ch. 51.

breach of the condition of a mortgage by non-payment of the mortgage money, or non-performance of the conditions stipulated in such mortgage, at the times and in the manner therein provided, the mortgagee, his heirs, executors, administrators, or assigns, may, in the county where the premises are situated,[1] sue out a writ of *scire facias*, directed to the sheriff, commanding him to make known to the mortgagor, his heirs, executors, or administrators, that he or they show cause why the premises ought not to be taken on execution for payment of said money and interest, or to satisfy the damages which the plaintiff shall suggest for the non-performance of said conditions. The defendant may plead satisfaction or other plea in avoidance of the deed. Judgment is entered that the plaintiff have execution by *levari facias*, under which the premises are sold, and after confirmation of the sale conveyed to the purchaser, who takes a title discharged of all equity of redemption, and all other incumbrances made by the mortgagor, his heirs, or assigns. Any overplus is rendered to the debtor or defendant.

But if there be no sale for want of bidders, return is made accordingly, and thereupon a *liberari facias* may issue, under which the officer delivers to the plaintiff such part of the premises as shall satisfy his debt or damages with interest and costs, according to the valuation of twelve men, to hold to him as his free tenement in satisfaction of his debt, or so much of it as the premises by the valuation amount to. If they fall short of satisfying the whole debt, the plaintiff may have execution for the residue. The execution and return pass the title.[2]

1329. District of Columbia.[3] — Foreclosure is under the general equity jurisdiction of the court. The only statutory provision relating to it is that publication may be substituted for personal service of process upon any defendant who cannot be found. Deeds of trust are, however, almost exclusively used.

1330. Florida.[4] — Foreclosure may be had by petition in the circuit court of the county in which the mortgaged premises are situated. This is a court of common law, but there is also jurisdiction of the subject in chancery, and the more general practice

[1] When the mortgaged land is in two counties the writ may be sued out in either. Laws 1887, ch. 221.

[2] R. C. p. 682.

[3] R. S. 1874, p. 93. There may be a decree *in personam* against the debtor for the balance remaining due after the proceeds of sale have been applied to the satisfaction of the debt. Dodge *v.* Freedman's Sav. & Trust Co. 106 U. S. 445.

[4] Dig. Laws 1881, pp. 766–768, ch. 153, §§ 5–12.

is said to be to proceed by bill in equity; but inasmuch as the statutory provisions for foreclosing by petition allow a personal judgment for any balance of the mortgage debt remaining unsatisfied after a sale of the premises, this has been declared to be the more convenient method.[1] The statutory process of foreclosure in a court of common law is not distinctively a common law action; it is in fact conducted according to equitable principles. It is brought in the circuit court of the county where the lands lie, and, like a bill in equity, sets forth the parties to the mortgage and the petitioner's title, and describes the premises and the debt secured.

The object of the statute allowing foreclosure by petition was to prevent the necessity of two suits; one in equity to foreclose, and a suit at law on the bond or note. The proceedings are *in rem* as to the foreclosure, and *in personam* as to the judgment for the debt or demand. In order to use this process there must be property upon which the decree of foreclosure can act.

Before this statute the mortgagee had his option to proceed in equity against the property, or at law on his bond or note; and he may now, as formerly, pursue either remedy, or both at the same time, but not in the same forum or in the same suit. This can only be accomplished by means of the statute.[2]

The petition with the original mortgage must be filed in the office of the clerk of the court at least four months before the term of the court at which judgment can be demanded. Upon the petition and mortgage, and exhibition to the court of any bond, note, or other evidence of the debt secured, with an affidavit of the petitioner, or of his agent or attorney, of the amount of the principal and interest claimed to be due, the court shall at the first term after the filing of such petition, unless good cause be shown to the contrary, give judgment for such debt and interest, with costs and charges of the proceedings, and shall also by its judgment forever foreclose and debar the mortgagor, and all persons claiming under him, of all right and equity of redemption. The original mortgage, or a copy of it duly certified, must form a part of every petition or bill of complaint for foreclosure.[3] Personal service of notice of the intention of the party to insti-

[1] Judge *v.* Forsyth, 11 Fla. 257.

[2] Judge *v.* Forsyth, *supra.*

[3] Dig. Laws 1881, p. 767. This provision contemplates a copy certified by the officer authorized by law to make a certificate of the character named. Browne *v.* Browne, 17 Fla. 607.

tute the suit must be served upon the mortgag or orother person having the equity of redemption, by an officer appointed to serve writs, four months before the term of court at which judgment may be rendered. If the owner of the equity of redemption reside beyond the jurisdiction of the court or out of the state, service is made by publication in a newspaper once in every two weeks for at least four months before the first day of the term.

Whenever a defendant has any objection or cause to show against the foreclosure, such objection or cause must be shown and filed, by way of plea to the petition of foreclosure, fifteen days before the first day of the term next following the expiration of the aforesaid respective periods prescribed for the publication or service of the notice, of the substance of the petition; and such plea, or the matters therein contained, must be verified by the oath of the party filing it, or of some other credible person. The petitioner may take issue on the plea, reply or demur thereto. The case is decided by court and jury, or the court alone, as the case may be. The judgment of the court is entered up and filed, and execution issues thereon as in other cases.

1331. Georgia.[1] — Foreclosure may be had by a bill in equity when the mode provided by statute is inadequate.[2] Mortgages are usually foreclosed by petition, which must be to the superior court in the county where the property is situated. But if the mortgaged premises consist of a single tract of land divided by a county line, such mortgage may be foreclosed on the entire tract in either of the counties in which part of it lies; provided, however, if the mortgagor resides upon the land, the mortgage must

[1] Code 1882, §§ 3962-3968. The judgment is binding upon a purchaser of the equity of redemption, although he was not made a party to the proceeding. Knowles *v.* Lawton, 18 Ga. 476; Johnston *v.* Crawley, 22 Ga. 348; *S. C.* 25 Ga. 316; Guerin *v.* Danforth, 45 Ga. 493, 496. No parties to the suit are necessary other than the mortgagor and mortgagee. If the rights of other persons are interfered with, they are not allowed to interpose any claim in the suit, but may have their remedy when the mortgage execution is sought to be enforced against the land. Jackson *v.* Stanford, 19 Ga. 14; Howard *v.* Gresham, 27 Ga. 347. As to jurisdiction, a court in another county, though it be the county of the mortgagor's residence, has none. The procedings of such court would be void. Hackenhull *v.* Westbrook, 53 Ga. 285. The act of 1880, allowing mortgages to be foreclosed in equity, conferred fuller powers upon the court by this mode of procedure than it had at law; and in addition to the foreclosure, a personal decree may be rendered against the mortgagor. Clay *v.* Banks, 71 Ga. 363.

[2] May *v.* Rawson, 21 Ga. 461; Dixon *v.* Cuyler, 27 Ga. 248, 251. A remedy at law being provided, jurisdiction in equity is lost when this remedy is complete.

be foreclosed in the county of his residence.[1] This is a proceeding at law. The court grants a rule *nisi* directing the principal, interest, and costs to be paid into court on or before the first day of the next term immediately succeeding the one at which the rule is granted, which rule is published once a month for four months, or served on the mortgagor, or his special agent or attorney, at least three months previous to the time at which the money is directed to be paid into court.[2] At the term at which the money is directed to be paid, the mortgagor may set up and avail himself of any defence which he might lawfully set up in an ordinary suit instituted on the debt secured by such mortgage.[3] The issue is tried by a special jury.

It is not competent for any third person to interpose a defence; nor will the court itself, of its own motion, do so.[4] When the mortgagor is dead, the proceeding may be instituted against his executor or administrator.[5] Judgment is entered for the amount due, and the property is ordered to be sold in the manner of a sale under execution, from which there is no redemption.[6] The proceeds, after paying the mortgage, are paid to the mortgagor or his agent. If the mortgage is given to secure a debt due by instalments, and is foreclosed before they are all due, and there is a surplus, the court may retain the funds, or order the same to be invested to meet the instalments still unpaid.[7]

1332. Idaho Territory.[8] — Actions for the foreclosure of mortgages of real property must be tried in the county in which the

[1] Code 1882, §§ 3962–3970.

[2] When the rule has been made absolute there is no appeal from it. Clifton *v.* Livor, 24 Ga. 91. It need not show on its face what particular credits were allowed in fixing the amount of the debt. Cherry *v.* Home Building & Loan Asso. 57 Ga. 361. A verdict for so many dollars as principal, with interest, is sufficiently formal. Byrd *v.* Turpin, 62 Ga. 591.

As to computation of time, see English *v.* Ozburn, 59 Ga. 392.

[3] Dixon *v.* Cuyler, 27 Ga. 248.

[4] Sutton *v.* Sutton, 25 Ga. 383; Jackson *v.* Stanford, 19 Ga 14.

[5] If there is no administrator, and the equity of redemption has been assigned, the proceeding should be in equity. May *v.* Rawson, 21 Ga. 461.

[6] See Dickerson *v.* Powell, 21 Ga. 143. This proceeding by petition is not confined to mortgages made to secure liquidated demands. Richards *v.* Bibb Co. Loan Asso. 24 Ga. 198. The judgment is not conclusive against one interested in the property who was not made a party to the proceedings, as, for instance, one who has purchased the property prior to the commencement of proceedings. Upon the levy of the execution he may go behind the judgment, and claim that the mortgage was barred by the statute of limitations. Williams *v.* Terrell, 54 Ga. 462.

[7] A foreclosure sale on one instalment of the debt passes the entire title to the property. There cannot be several foreclosures of the same mortgage. Smith *v.* Bowne, 60 Ga. 484.

[8] R. S. 1887, §§ 4520–4522.

subject of the action or some part thereof is situated. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, in which action the court may, by its judgment, direct a sale of the incumbered property, or so much thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases, on which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action. If there be surplus money remaining after payment of the amount due on the mortgage, lien, or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the mean time may direct it to be deposited in court. If the debt for which the mortgage, lien, or incumbrance is held be not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease; and afterwards, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

1333. Illinois. — Mortgages may be foreclosed in equity although the statutory provisions relate chiefly to proceedings by *scire facias*, and to sales under powers contained in mortgages.[1] In equity a decree may be rendered for any balance of money that may be found due over and above the proceeds of the sale, and execution may issue for the collection of such balance in the same way as when the decree is solely for the payment of money.

[1] See § 1733.

Such decree may be rendered conditionally at the time of decreeing the foreclosure, or it may be rendered after the sale and the ascertainment of the balance due.[1]

The court in proper cases will decree a strict foreclosure; but this is not allowed in case of mortgages by executors, guardians, and conservators.[2]

Scire facias.[3] If default be made in the payment of a mortgage duly executed and recorded,[4] and if it be payable by instalments, and the last instalment has become due, a writ of *scire facias* may be sued out of the circuit court of the county where the lands or any part of them are situated, requiring the mortgagor or his representatives to show cause why judgment should not be rendered for the amount due under the mortgage.[5]

[1] R. S. 1874 and 1880, ch. 95, § 16.

[2] R. S. 1877, pp. 120, 540, 653.

[3] R. S. 1874, 1877, and 1880, ch. 95, §§ 17–21. For form of this writ see Woodbury *v.* Manlove, 14 Ill. 213; approved in Osgood *v.* Stevens, 25 Ill. 89. When foreclosure is by *scire facias*, subsequent incumbrancers are cut off, though not made direct parties to the proceeding. Kenyon *v.* Shreck, 52 Ill. 382; Matteson *v.* Thomas, 41 Ill. 110. Failure or want of consideration cannot be shown in this proceeding. Fitzgerald *v.* Forristal, 48 Ill. 228; Woodbury *v.* Manlove, *supra.* This is a proceeding upon the mortgage, and must be by the mortgagee holding the legal title. It does not matter that the note has been assigned. Camp *v.* Small, 44 Ill. 37; Olds *v.* Cummings, 31 Ill. 188.

[4] A mortgage not duly executed and recorded cannot be foreclosed in this way; and acknowledgment is considered a part of the due execution of it. Kenosha & Rockford R. R. Co. *v.* Sperry, 3 Biss. 309.

[5] No declaration need be filed. The defendant may set off any demand in his favor. Henderson *v.* Palmer, 71 Ill. 579.

No defence can be interposed except payment of the mortgage debt, a release of the lien, or that the mortgage was never a valid lien. Camp *v.* Small, *supra;* White *v.* Watkins, 23 Ill. 480.

Judgment is rendered for the amount found due, and the premises are sold to satisfy it. Such judgment does not create a lien on any other lands than the mortgaged premises, nor is any other property of the mortgagor liable to satisfy the same except such other property as the mortgagor has given as collateral security for this purpose. This is purely a proceeding at law, and is governed by the practice of courts of law and not of equity. Tucker *v.* Conwell, 67 Ill. 552; Woodbury *v.* Manlove, *supra.*

The action must be brought by the person who holds the legal title to the mortgage, and consequently if the note alone has been assigned the suit should be brought by the mortgagee. Camp *v.* Small, *supra.* But the assignee may foreclose by *scire facias*, though the assignment has not been acknowledged. Honore *v.* Wilshire, 109 Ill. 103.

No persons but the mortgagor, or, in case of his death, his executor or administrator, are required to be made parties. If the wife joined in the mortgage she is a necessary party. The mortgagor's assignee in bankruptcy is not a necessary party. Gilbert *v.* Maggord, 1 Scam. 471.

All persons beyond the parties to the suit are required to take notice of the proceedings and to protect their rights. Chickering *v.* Failes, 26 Ill. 507.

Usury cannot be set up; Carpenter *v.* Mooers, 26 Ill. 162; nor the want or failure of consideration. Hall *v.* Byrne, 1 Scam. 140; McCumber *v.* Gilman, 13 Ill. 542.

When a sale is made by virtue of an execution, judgment, or decree of foreclosure, the officer gives a certificate of sale.[1] The owner of the equity or any person interested in it may redeem at any time within twelve months from the sale, by paying the amount bid, with interest at the rate of ten per cent. per annum.[2] A judgment creditor may redeem after twelve months and within fifteen months after the sale, and there may be successive redemptions within sixty days from the last redemption.[3] After the expiration of the time of redemption the party entitled to possession, after a demand in writing, may have summary process to recover it. Until the time allowed for redemption expires, and the master's deed is executed, the owner of the equity of redemption is entitled to possession.[4]

1334. Indiana.[5] — Foreclosure is by complaint in the circuit

This form of foreclosure cannot be used in case of a mortgage made to secure the delivery of specific articles. It cannot be maintained till the last instalment of the mortgage is due, and this fact should be alleged. Any remedy before this must be sought by ejectment, or by bill in chancery. Osgood *v.* Stevens, 25 Ill. 89; Carroll *v.* Ballance, 26 Ill. 9; Fickes *v.* Ersick, 2 Rawle (Pa.), 166; Day *v.* Cushman, 1 Scam. 475.

The purchaser at a sale under a judgment in such action takes all the interest in the land which the mortgagor had when he executed the mortgage. State Bank *v.* Wilson, 9 Ill. 57.

The mortgagor, or his grantees since the mortgage, may redeem, as in the case of an ordinary sale on execution. The judgment is against the property and not against the person. Osgood *v.* Stevens, 25 Ill. 89; Marshall *v.* Maury, 1 Scam. 231; State Bank *v.* Wilson, 9 Ill. 57.

[1] Annotated Stats. 1885, ch. 77, §§ 16, 19. A certificate of purchase issued to a person other than the one who, by the sheriff's return, is shown to be the purchaser, is void. Dickerman *v.* Burgess, 20 Ill. 266.

[2] Seligman *v.* Laubheimer, 58 Ill. 124. The payment required is the amount bid at the sale, and not the amount of the mortgage debt. The construction of the Iowa statute is different, requiring payment of the amount of the debt instead of the amount bid. Stoddard *v.* Forbes, 13 Iowa, 296; Johnson *v.* Harmon, 19 Iowa, 56. The case of Bradley *v.* Snyder, 14 Ill. 263, is not contrary to this, as the redemption in the latter was not strictly a statutory right. There can be no decree for sale without redemption. Farrell *v.* Parlier, 50 Ill. 274.

[3] A purchaser of the equity of redemption is allowed the twelve months for redemption prescribed for the mortgagor, and not the fifteen allowed a judgment creditor. Dunn *v.* Rodgers, 43 Ill. 260. The judgment creditor, upon redemption is subrogated to all the rights of the purchaser under the foreclosure sale. Lamb *v.* Richards, 43 Ill. 312. He may redeem against a second mortgagee who has taken an assignment of the certificate of purchase. Grob *v.* Cushman, 45 Ill. 119; Forcible Entry and Detainer Act, § 2; R. S. 1874, p. 535.

[4] Kihlholz *v.* Wolff, 8 Bradw. (Ill.) 371.

[5] R. S. 1888, §§ 307, 575, 1094–1105. When all the parties are properly before the court upon the complaint and cross-complaint, the court may adjust and settle the claims and equities of all the parties. Quill *v.* Gallivan, 9 N. E. Rep. 99.

Foreclosure may also be effected in a proceeding in garnishment. Sharts *v.* Awalt, 73 Ind. 304.

court of the county where the land lies.[1] A sale of the property must in all cases be ordered. It is sufficient to make the mortgagee, or the assignee shown by said record to hold an interest therein, defendants.

When there is no express agreement for the payment of the sum secured thereby contained in the mortgage, or in any separate instrument, the remedy is confined to the mortgaged property. In rendering judgment the court gives personal judgment against any party to the suit liable upon any agreement for the payment of the debt secured, and orders the mortgaged premises to be first sold before levy of execution upon other property of the defendant.

The plaintiff cannot proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor can he prosecute any other action for the same matter while he is foreclosing his mortgage, or prosecuting a judgment of foreclosure.

When the complaint is in consequence of the non-payment of an instalment of interest or of the principal, and the whole debt is not due, it is dismissed on payment into court at any time before judgment of the amount then due; if the payment be made after final judgment, proceedings thereon are stayed, subject to be enforced upon a subsequent default. In the final judgment the court directs at what time execution shall issue.[2] The court in such cases ascertains whether the property can be sold in parcels, and if this can be done without injury, it directs so much only of the premises to be sold as will be sufficient to pay the amount due on the mortgage with costs. If the premises cannot be sold in parcels the court orders the whole to be sold, and the proceeds applied first to the payment of the principal due, inter-

[1] If the land lies in more than one county the court of either has jurisdiction. Holmes *v.* Taylor, 48 Ind. 169. The form of complaint given by statute is as follows: "A. B. complains of C. D., and says that the defendant executed a mortgage conveying to the plaintiff the tract of land therein described, as security for the payment of a debt evidenced by a note, a copy of each of which is filed herewith, amounting to dollars, which yet remains unpaid: wherefore he asks judgment for dollars, and the foreclosure of the mortgage, and sale of the property, or so much thereof as may be necessary to pay his debt, and for other relief." Ibid. p. 359. There can be no foreclosure except by judicial sale, and therefore power of sale mortgages and trust deeds are not in use.

[2] See Skelton *v.* Ward, 51 Ind. 46.

est, and costs, and then to the residue secured and not due, with a proper discount of interest.[1]

In making sale the sheriff or other officer issues to the purchaser a certificate, which entitles the holder of it to a deed of conveyance, to be executed by the officer at the expiration of one year from the date of the sale, if the property has not been previously redeemed.[2] The debtor is in the mean time entitled to the possession of the premises, but in case they are not redeemed he is liable to the purchaser for their reasonable rents and profits.

Redemption may be made by any one having an interest in the property at any time within one year from the date of sale, by paying to the purchaser, or to the clerk of the court from which the order of sale was issued, for the use of the purchaser, the amount of the purchase money, with interest at the rate of ten per cent. per annum.[3] When a mortgagee or judgment creditor

[1] Generally when divisible the premises should be sold in parcels. Frame *v.* Bell, 16 Ind. 229; Dale *v.* Bugh, 16 Ind. 233; Piel *v.* Brayer, 30 Ind. 332. This statute, however, applies only to cases where part of the mortgage is not due. Harris *v.* Makepeace, 13 Ind. 560; Smith *v.* Pierce, 15 Ind. 210; Benton *v.* Wood, 17 Ind. 260; Denny *v.* Graster, 20 Ind. 20. Whether the premises are susceptible of division is a question for the court to decide. The court must also direct the order of sale. A decree giving the plaintiff the right to direct the sale is erroneous. Knarr *v.* Conaway, 42 Ind. 260. The failure of the court to determine whether the premises are divisible does not render the order of sale void; but it may be set aside on seasonable application. Cassel *v.* Cassel, 26 Ind. 90; Thompson *v.* Davis, 29 Ind. 264. The sale must be made according to the statute in force when the mortgage was executed. Wolf *v.* Heath, 7 Blackf. 154; Franklin *v.* Thurston, 8 Blackf. 160. If the land is situate in two counties, the part in each must be sold at the door of the court-house of the county where it is situated. Holmes *v.* Taylor, 48 Ind. 169.

Upon foreclosure and satisfaction of judgment for the whole debt, the clerk of the court shall immediately enter satisfaction on the records of the recorder's office of the county. Acts 1881, § 715 of Civil Code.

[2] The certificate of purchase may be assigned, and the deed is then made to the assignee. Splahn *v.* Gillespie, 48 Ind. 397; Davis *v.* Langsdale, 41 Ind. 399. On the decease of the holder of the certificate, the deed may be made to his heirs or devisees. Sumner *v.* Palmer, 10 Rich. (S. C.) 38; McElmurray *v.* Ardis, 3 Strob. (S. C.) 212; Swink *v.* Thompson, 31 Mo. 336.

[3] A liberal construction should be given to the right of redemption. A holder of one of several mortgage notes, who has filed a cross-bill in proceedings by the holder of another note, and obtained a judgment for foreclosure as to the note held by him, may redeem from the foreclosure sale, as a judgment creditor. Davis *v.* Langsdale, *supra*. A mortgagee having a judgment for a deficiency may also redeem. Greene *v.* Doane, 57 Ind. 186. See § **1069**. See, also, Teal *v.* Hinchman, 69 Ind. 379. As to right of junior mortgagee to redeem, see Duesterberg *v.* Swartzel (Ind.), 17 N. E. Rep. 155. No redemption after the lapse of a year. 102 Ind. 125.

redeems, he retains a lien on the premises for the amount paid for redemption against the owner or any junior incumbrancer.[1]

1335. Iowa.[2] — All deeds of trust and mortgages of real estate, whether they contain a power of sale or not, must be foreclosed by an equitable proceeding in court in the county in which the property or some part of it is situated.[3] In such action judgment is entered for the entire amount found due, and under a special execution the property, or so much as is necessary, is sold to satisfy it with interest and costs. If the property does not sell for enough to satisfy the judgment, a general execution may be issued for the balance, unless the parties have stipulated otherwise.[4] A personal judgment cannot be rendered against a subsequent purchaser who has not assumed the mortgage.[5] But a subsequent purchaser who has assumed the payment of the mortgage debt is liable to a personal judgment, and parol evidence is admissible to prove his agreement to assume the debt.[6]

At any time prior to the sale, a person having a lien subsequent to the mortgage is entitled to an assignment of all the interest of the holder of the mortgage on paying him the amount secured, with interest and costs, together with the amount of any other liens of the same holder which are paramount to his.

If there is an overplus remaining after satisfying the mortgage and costs, and if there is no other lien upon the property, such overplus shall be paid to the mortgagor. If there are any other liens on the property sold, or other payments secured by the same mortgage, they shall be paid off in their order. And if the money secured by any such lien is not yet due, a suitable rebate of interest must be made by the holder thereof, or his lien on such property will be postponed to those of a junior date, and if there are none such, the balance will be paid to the mortgagor. As far

[1] See Smith *v.* Moore, 73 Ind. 388.

[2] Code 1873, and R. Code 1880, §§ 3319–3330; Acts 1884, ch. 126. This is a statutory proceeding, to which the court will apply the principles of both law and equity. Kramer *v.* Rebman, 9 Iowa, 114; McDowell *v.* Lloyd, 22 Iowa, 448; Hartman *v.* Clarke, 11 Iowa, 510; Packard *v.* Kingman, 11 Iowa, 219, 221. The action must be brought in the county in which the property or some part of it is situated. R. Code 1880, § 2578.

[3] This provision is not open to the constitutional objection that it infringes upon the right of trial by jury. Clough *v.* Seay, 49 Iowa, 111.

[4] Chittenden *v.* Gossage, 18 Iowa, 157; Kennion *v.* Kelsey, 10 Iowa, 443; Elmore *v.* Higgins, 20 Iowa, 250.

[5] Carleton *v.* Byington, 24 Iowa, 172.

[6] Bowen *v.* Kurtz, 37 Iowa, 239.

as practicable, the property sold must be only sufficient to satisfy the mortgage foreclosed.[1]

A bond or an agreement to convey may be treated as a mortgage and foreclosed in the same manner.[2]

A foreclosure sale is subject to redemption in the same manner as a sale under general execution. The owner of the equity may redeem at any time within one year from the day of sale, and in the mean time is entitled to the possession of the property.[3] For the first six months his right to redeem is exclusive; but after that any creditor of his may redeem at any time within nine months from the sale. Creditors may redeem from each other within such time. The terms of redemption are, the reimbursement of the amount paid by the person who then holds under the sale, together with the amount of his own lien, with interest at the rate of ten per cent. per annum, together with costs. When redemption is made from a mortgagee whose debt is not due, he must rebate interest at the same rate. After the expiration of nine months, creditors can no longer redeem from each other, but the owner of the equity may still redeem at any time before the end of the year. If the property is finally held by a redeeming creditor, his lien, and the claim out of which it arose, will be held to be extinguished unless within ten days after the nine months limited he enters on the sale book the utmost amount he is willing to credit on his claim. The mode of making redemption is by paying the money into the clerk's office for the use of the persons entitled to it. At the end of the year the sheriff makes the deed to the person entitled to it. In the mean time the mortgagor is entitled to possession.[4]

[1] R. Code 1880, §§ 3324, 3325, 3326.

[2] Code, and R. Code 1880, § 3329. But the vendor may at his election recover the purchase money at law. Hershey *v.* Hershey, 18 Iowa, 24; Hartman *v.* Clarke, 11 Iowa, 510. See, also, Blair *v.* Marsh, 8 Iowa, 144; Page *v.* Cole, 6 Iowa, 153; Mullin *v.* Bloomer, 11 Iowa, 360; Guest *v.* Byington, 14 Iowa, 30; Arms *v.* Stockton, 12 Iowa, 327; Wall *v.* Ambler, 11 Iowa, 274.

[3] After the expiration of the year of redemption, it is too late for the judgment debtor to redeem when he has made no tender of the amount due, nor brought it into court before the expiration of the year, although he had paid a large amount of the debt which had not been credited on the judgment. M'Conkey *v.* Laub, 33 N. W. Rep. 146.

[4] Code 1873, and R. Code 1880, §§ 3321, 3101–3129. A junior mortgagee redeeming more than six and less than nine months after the sheriff's sale, by purchasing the certificate, becomes the absolute owner of the land, and his mortgage is fully satisfied. Lamb *v.* Feeley, 71 Iowa, 742; 30 N. W. Rep. 652; Lamb *v.* West (Iowa), 39 N. W. Rep. 666. During such period redemption may be made between the parties without the aid of the clerk. Goode *v.* Cummings, 35 Iowa, 67. As to successive redemptions by creditors

1336. Kansas.[1] — Foreclosure is by an equitable action under the Code. The action is a local one, and must be brought in the county in which the land is situated.[2] An attachment of other property may be made in the foreclosure suit as in other actions for the recovery of money, upon an affidavit setting forth sufficient grounds, among which is the insufficiency of the security.[3]

In actions to enforce a mortgage, deed of trust, or other lien or charge, a personal judgment is rendered, as well to the plaintiff as other parties having liens, for the amount due with interest, and for the sale of the property and application of the proceeds.[4] There can be no sale of the mortgaged real estate, pledged or assigned as security, except in pursuance of a judgment of a court of competent jurisdiction ordering such sale.[5]

The suit is always for the debt, whether the plaintiff asks to have the mortgaged property applied in payment of it or not; and the judgment is always a personal judgment for the debt, whether an order is obtained to have the property sold to satisfy the debt or not.[6] A judgment requiring the defendant to pay the debt and costs within one day after its rendition, and requiring the clerk on default to issue a special execution to sell the real estate to satisfy the judgment, is not erroneous because no more time is allowed him to pay the money before the issuing of the special execution.[7]

1337. Kentucky.[8] — Foreclosure is made under the jurisdiction of a court of equity. The bill may be brought in any county in which any part of the mortgaged land lies.[9] A sale of the premises, or so much of them as may be necessary, must in all

see Woonsocket Inst. for Sav. *v.* Gouldin, 28 Fed. Rep. 900; George *v.* Hart, 56 Iowa, 706; Newell *v.* Pennick, 62 Iowa, 123; Goode *v.* Cummings, 35 Iowa, 67. The lien of a junior mortgagee, who redeems after six and before nine months from the foreclosure of the prior mortgage without making the statement of record as to the amount he is willing to credit, is discharged. West *v.* Fitzgerald, 33 N. W. Rep. 688.

[1] Compiled Laws 1885, § 4210.

[2] Shields *v.* Miller, 9 Kans. 390, 397; App *v.* Bridge, McCahon, 118.

[3] Shedd *v.* McConnell, 18 Kans. 594.

[4] As mortgages can be foreclosed by suit only, power of sale mortgages and trust deeds are of no practical advantage.

[5] There is no redemption. The sale cuts off all right. Kirby *v.* Childs, 10 Kans. 639.

[6] Lichty *v.* McMartin, 11 Kans. 565; Jenness *v.* Cutler, 12 Kans. 510; Gillespie *v.* Lovell, 7 Kans. 419, 423.

[7] Blandin *v.* Wade, 20 Kans. 251.

[8] Civil Code 1876.

Power of sale mortgages and trust deeds must be enforced by a court of equity; but in making sale the court will follow the terms of the power. Campbell *v.* Johnston, 4 Dana, 178.

[9] Caufman *v.* Sayre, 2 B. Mon. 207; Owings *v.* Beall, 3 Litt. 103; Shiveley *v.* Jones, 6 B. Mon. 274.

cases be decreed.[1] Before the Code, the court could not decree the payment of any balance found due after the application of the proceeds of sale, if the mortgagee had a legal remedy for obtaining this.[2]

Under the Code a strict foreclosure is forbidden.[3] In an action to enforce a mortgage or lien, judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally.[4] A sale of the property may be ordered without giving time to pay money or do other act.[5] Before ordering a sale of real property for the payment of debt, the court must be satisfied by the pleadings, by an agreement of the parties, by affidavits filed, or by a report of a commissioner or commissioners, whether or not the property can be divided without materially impairing its value; and may cause it to be divided, with suitable avenues, streets, lanes, or alleys, or without any of them. If it be necessary to sell, for the payment of debt, a parcel of real property which cannot be divided without materially impairing its value, the officer is required to sell the whole of it, though it bring more than the sum to be raised; and the court shall make proper orders for the distribution of the proceeds. The plaintiff in an action to enforce a lien on real property must state in his petition the liens, if any, which are held thereon by others, and make the holders defendants; and no sale of the property shall be ordered by the court prejudicial to the rights of the holders of any of the liens; and when it appears from the petition or otherwise that several debts are secured by one lien, or by liens of equal rank, and they are all due at the commencement of the action, or become so before judgment, the court shall order the sale for the *pro rata* satisfaction of all of them; but if in such case the debts be owned by different persons and be not all due, the court shall not order a sale of the property until they all mature. If all such liens be held by the same party, the court may order a sale of enough of the property to pay the debts then due, unless it appear that it is not susceptible of advantageous division; or that, for some other reason, the sale would cause a sacrifice thereof, or seriously prejudice the interests of the

[1] Formerly, under the general jurisdiction in equity, the court might order a strict foreclosure. See § 1547.

[2] Downing *v.* Palmateer, 1 Mon. 64, 67; Martin *v.* Wade, 5 Mon. 77; Morgan *v.* Wilkins, 6 J. J. Marsh. 28; Crutchfield *v.* Coke, Ib. 89; Martin *v.* Wade, 5 Mon. 77, 79.

[3] Civil Code, § 375.

[4] Civil Code, § 376.

[5] Civil Code, § 374.

defendants.[1] Every sale made under an order of court must be public, upon reasonable credits to be fixed by the court, not less, however, than six months for real property; and shall be made after such notice of the time, place, and terms of sale as the order may direct; and, unless the order direct otherwise, shall be made at the door of the court-house of the county in which the property, or the greater part thereof, may be situated; and the notice of such sale must state for what sum of money it is to be made.[2] A lien exists on real property sold under an order of court, as security for the purchase money; and, upon payment thereof, the clerk releases the lien on the margin of the record of the deed in the office of the clerk of the county court.[3]

There is no redemption after a sale. Formerly the practice was to render in the first place a decree *nisi* that money be paid by a day certain, usually some day in the succeeding term; and upon failure to pay, a final decree foreclosing absolutely, or directing a sale of the property, was made.[4]

1338. Louisiana. — The civil law system prevails in this state, and as this differs so widely as regards the law of mortgages as well as in other respects from the common law system adopted in the other states, no attempt is made to give any full statement of the law relating to mortgages and the foreclosure of them.[5] In general it may be said that a mortgage executed according to the law of this state is an authentic act before a notary public, and imports a confession of judgment. After the debt is due, the mortgage is foreclosed by instituting a regular suit and obtaining judgment thereon; or upon confession of judgment the court may order the sheriff to proceed at once to seize and sell the mortgaged property.[6] The hypothecary action by which mortgages are foreclosed is a real action, or a proceeding *in rem*, whereby the property is followed wherever it may be found. It may be instituted before a court of ordinary jurisdiction. Thirty days' notice to the debtor must be given as a prerequisite to the

[1] Civil Code, § 694.

[2] Civil Code, § 696.

[3] Civil Code, § 699.

[4] Downing *v.* Palmateer, 1 Mon. 64, 66; Martin *v.* Wade, 5 Mon. 77, 80; Hanks *v.* Greenwade, 5 J. J. Marsh. 249.

[5] As to rights of second mortgagee in the surplus, see Quertier *v.* Hille, 18 La. Ann. 65. This is a statutory remedy, but does not oust the equitable jurisdiction of the United States courts to enforce the mortgage. Benjamin *v.* Cavaroc, 2 Woods, 168.

[6] Boguille *v.* Faille, 1 La. Ann. 204; and see Story's Eq. § 1007.

bringing of the action.[1] If the property does not sell for enough to satisfy the mortgage, the mortgagee becomes an ordinary creditor for the balance.[2]

A mortgage which contains the *pact de non alienando* may be enforced by proceedings against the mortgagor alone, notwithstanding the alienation of the property, whether voluntary or in proceedings for confiscation.[3]

1339. Maine. — A bill in equity cannot be sustained to foreclose a mortgage. The modes provided by statute must be pursued. These are by entry and possession, by advertisement, and by writ of entry.[4]

The mortgagor or any person claiming under him may redeem at any time within three years after the mortgagee has obtained possession by entry or by action, or after the first publication of notice, or the service of it, as provided in that mode of foreclosure; but when the mortgagor and mortgagee have in the mortgage agreed upon a less time, but not less than one year, in which the mortgage shall be foreclosed, redemption must be had accordingly.[5] Such redemption applies to each and all the modes prescribed by statute for the foreclosure of mortgages of real estate. After payment or tender of the amount due on the mortgage, a bill in equity may be maintained for redemption and to compel the mortgagee to release his right. When the bill is founded on a tender made before the commencement of the suit, it must be commenced within one year after the tender.[6]

1340. Maryland.[7] — Mortgages are foreclosed by suit in chan-

[1] Gentis *v.* Blasco, 15 La. Ann. 104; Taylor *v.* Pearce, Ib. 564.

[2] Salzman *v.* Creditors, 5 Rob. (La.) 241. In order to make a valid sale of land under a foreclosure of a mortgage, it is indispensably necessary in all parishes, except Jefferson and Orleans, that there should be an actual seizure of the land; not perhaps an actual turning out of the party in possession, but some taking possession of it by the sheriff not merely constructively. Watson *v.* Bondurant, 21 Wall. 123. As to where the sale should take place, see Walker *v.* Villavoso, 26 La. Ann. 42. As to the disposition of the surplus, see Quertier *v.* Hille, 18 La. Ann. 65; Lacoste *v.* West, 19 La. Ann. 446.

A mortgage or deed of trust executed in another state on property in Louisiana, to secure the payment of promissory notes, takes effect as a conventional mortgage, and may be enforced as such under the jurisprudence of that state. Pickett *v.* Foster, 36 Fed. Rep. 514.

[3] Avegno *v.* Schmidt, 113 U. S. 293; New Orleans Nat. Banking Asso. *v.* Le Breton, 120 U. S. 765; 7 Sup. Ct. Rep. 772.

[4] Ireland *v.* Abbott, 24 Me. 155; Shaw *v.* Gray, 23 Me. 174; Chase *v.* Palmer, 25 Me. 341. See § §1238, 1239, 1277.

[5] R. S. 1883, ch. 90, § 6.

[6] For proceedings to redeem, see R. S. 1883, ch. 90, §§ 13–20.

[7] R. Code 1878, art. 66, §§ 64, 65.

cery, in which there may be a decree that unless the debt and costs are paid by the time fixed by the decree there shall be a sale of the property, or of so much of it as may be necessary.[1] This, however, is merely a cumulative remedy, and does not do away with a strict foreclosure. The heirs of the mortgagee need not be made parties to the bill, but any decree upon a bill filed by the executor or administrator of the mortgagee has the same effect as if his heirs were parties to it. The sale is made in the county or city where the premises are situated; but if situated in more than one county, the sale may be made in either. There is no redemption.[2]

When any suit is instituted to foreclose a mortgage the court may decree that, unless the debt and cost be paid by a day fixed by the decree, the property mortgaged, or so much thereof as may be necessary for the satisfaction of said debt and cost, shall be sold, and such sale shall be for cash, unless the complainant shall consent to a sale on credit; and if upon the sale under such decree of the whole mortgaged property the net proceeds thereof, after the costs allowed by the court are satisfied, shall not suffice to satisfy the mortgage debt and accrued interest, as this shall be found by the judgment of the court upon the report of the auditor thereof, the court may, upon the motion of the complainant, enter a decree *in personam* against the mortgagor, or other party to the suit who is liable for the payment thereof, provided the mortgagee would be entitled to maintain an action at law upon the covenants contained in said mortgage for said residue of the said mortgage debt, so remaining unsatisfied by the proceeds of such sale, which decree shall have the same effect as a judgment at law, and may be enforced only in like manner by a writ of execution in the nature of a writ of *fieri facias*, or otherwise.[3]

1341. Massachusetts. — Foreclosure in equity is very rare, although jurisdiction of the subject is given by statute in cases

[1] This provision, that the court may decree a sale unless the debt be paid by a day fixed in the decree, may be waived by the mortgagor in his answer, or by previous assent in the mortgage itself; as by a stipulation that upon any default the mortgagee "may forthwith foreclose this mortgage and sell the property." Dorsey *v.* Dorsey, 30 Md. 522.

[2] Ing *v.* Cromwell, 4 Md. 31; Eichelberger *v.* Harrison, 3 Md. Ch. 39; Andrews *v.* Scotton, 2 Bland, 629, 667.

[3] If the mortgage is payable by instalments, a sale will be decreed of so much of the property as will pay the amount due, and the decree will stand as security for other instalments as they fall due; and if it cannot be sold in parcels, the court may order it sold entire, and the whole debt paid, with a rebate of interest for sums not due. Peyton *v.* Ayres, 2 Md. Ch. 64.

where there is not a plain, adequate, and complete remedy at common law.[1] Mortgages are generally foreclosed by entry and possession, or by writ of entry, or under powers of sale contained in the mortgages.[2]

Redemption[3] may be had at any time within three years after the mortgagee has obtained possession for the purpose of foreclosure. If a tender be made of the whole sum due on the mortgage within the three years limited for redemption, and it be not accepted, a suit in equity for redemption may be brought within one year after the tender is made. If in such suit the plaintiff alleges a tender, he must when he commences his suit pay the sum thus tendered to the clerk of the court for the use of the party entitled thereto. But he may at any time within the three years, and either before or after entry for breach of the condition, bring a suit for redemption without a previous tender, and may therein offer to perform the condition of the mortgage. If suit is brought without a previous tender, and it appears that anything is due on the mortgage, the plaintiff must pay the costs, unless the mortgagee has unreasonably refused or neglected when requested to render a just and true account of the money due on the mortgage, and of the rents and profits and sums paid for taxes, repairs, and improvements; or unless he has prevented the plaintiff from performing or tendering performance of the condition. If the tender be insufficient, the plaintiff is nevertheless entitled to redemption if the suit has been commenced within the three years. If too much be tendered, the surplus is restored to the plaintiff. If it appears that the mortgagee has received from the rents and profits or otherwise more than is due on the mortgage, judgment and execution are awarded against him for the sum due the plaintiff.

1342. Michigan.[4] — Bills for foreclosure are filed in the circuit court in chancery of the county where the premises, or any part of them, are situated. The court has power to decree a sale of the mortgaged premises, or such part of them as may be sufficient to discharge the amount due on the mortgage, and the costs of suit; but no lands are to be sold within one year after the fil-

[1] G. S. 1860, ch. 113, § 2; P. S. 1882, ch. 151, § 2; Shaw *v.* Norfolk Co. R. R. Co. 5 Gray, 162; Lowell *v.* Daniels, 2 Cush. 234.

[2] See chapters XXVIII and XXIX.

[3] G. S. ch. 140, §§ 13–35; P. S. 1882, ch. 181, §§ 21–41.

[4] Annotated Stats. 1882, §§ 6700–6716.

ing of the bill of foreclosure.[1] The court may compel the delivery of the possession of the premises to the purchaser, and on the coming in of the report of sale may decree the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises, in the cases in which such balance is recoverable at law ; and for that purpose may issue the necessary executions as in other cases against other property of the mortgagor.

No proceedings at law for the recovery of the debt can be had while the bill is pending, unless authorized by the court. If the debt be secured by the obligation or other evidence of debt of any person besides the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance of the debt unsatisfied after a sale of the premises, as well against such other person as against the mortgagor. Upon the filing of the bill, the complainant must state in it whether any proceedings have been had at law for the recovery of the debt, or any part of it, and whether any part of it has been paid. If any judgment has been obtained at law, no proceedings can be had, unless return is made that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy the execution except the mortgaged premises.[2]

All sales are made by a circuit court commissioner of the county in which the decree was rendered, or the land or some part of it is situated, or by some other person authorized by the order of the court. The sales are at public vendue between the hour of nine o'clock in the morning and the setting of the sun, at the court-house, or place of holding the circuit court, in the county in which the estate or some part of it is situated, or at such other place as the court may direct. Deeds are executed by

[1] The purpose of this provision being to give the mortgagor time to make payment and save the lands, that purpose is not served by allowing a sale within six months after he first has notice that a bill has been filed, even though it has been on file for six months previous. The court may postpone the sale until the expiration of a year from service of the subpœna. Detroit F. & M. Ins. Co. *v.* Renz, 33 Mich. 298. The one year and six weeks that must elapse before the sale on foreclosure may be computed from the date of taking out the subpœna, if it is taken out with the intention in good faith of serving it as soon as possible, and there is no laches in obtaining service. Culver *v.* McKeown, 43 Mich. 322.

[2] A bill cannot be maintained which shows that a judgment has been recovered on one of the notes, and that it was nearly paid, but did not show that an execution had been issued and returned unsatisfied in whole or in part, and did not waive a decree as to that note. Dennis *v.* Hemingway, Walker's Ch. 387.

the commissioner, or other person making the sale, specifying the names of the parties to the suit, the date of the mortgage, when and where recorded, with a description of the premises sold, and the amount bid for the same, which vest in the purchaser the same estate that would have vested in the mortgagee if the equity of redemption had been foreclosed, and no other or greater; and the deeds are as valid as if executed by the mortgagor and mortgagee, and are an entire bar against each of them, and against all parties to the suit in which the decree was made, and against their heirs and all persons claiming under them.[1]

The proceeds of a sale under the decree are applied to the discharge of the debt adjudged by the court to be due, and of the costs awarded; any surplus there may be is brought into court for the use of the defendant, or of the person entitled to it, subject to the order of the court. If this remains for three months without being applied for, the court may direct it to be put out at interest, under the direction of the court, for the benefit of the defendant. Where a portion of the mortgage debt is not due at the time of the filing of the bill, it is dismissed upon the defendant's bringing into court, at any time before the decree of sale, the principal and interest due, with costs.[2] If he bring this in after a decree of sale has been entered the proceedings are stayed; but the court enters a decree of foreclosure and sale, to be enforced by a further order of court upon a subsequent default.[3]

The court may direct a reference to a master, to ascertain and report the situation of the premises, or may determine the same on oral or other testimony; and if it appear that they can be sold in parcels without injury, the decree directs so much of the premises to be sold as will be sufficient to pay the amount then due on the mortgage, with costs; and such decree remains as security for any subsequent default. If there be any default subsequent to the decree, the court may, upon the petition of the complainant, by further order direct a sale of so much of the premises as will be sufficient to satisfy the amount due, with the costs of the peti-

[1] For provisions as to the publication of notices, and the preservation of evidence of service, see Annotated Stats. 1882, §§ 7497, 7498.

As to what is a sufficient affidavit under these provisions, see Brown *v.* Phillips, 40 Mich 264.

[2] Brown *v.* Thompson, 29 Mich. 72.

[3] The proceedings for a further decree are essentially a new suit in all respects except form; and notice must be given to all persons whose interests will be affected in the same manner as in the original suit. No decree can be entered without proof, as in other cases. Brown *v.* Thompson, *supra.*

tion; and such proceedings may be had as often as a default may happen. If it appear that a sale of the whole of the premises will be more beneficial to the parties, the decree in the first instance is entered for the sale of the whole. Upon a sale of the whole, the proceeds are applied as well to the portion of the debt due as towards that not due, with a rebate of legal interest in case the residue do not bear interest; or the court may direct the balance of the proceeds of such sale, after the payment of the portion due, to be put out at interest for the benefit of the complainant, to be paid him as the instalments may become due, and the surplus for the benefit of the defendant, to be paid on the order of the court.

1343. Minnesota.[1] — Actions for the foreclosure of mortgages are governed by the rules and provisions of statute applicable to civil actions. Service by publication for six weeks, as in the case of a sale under power, may be made upon all parties to the action against whom no personal judgment is sought, and such judgment may be taken at the expiration of twenty days after the completion of publication. Such judgment is entered for the amount due with costs, and directs the sheriff to proceed to sell the same as on execution and make report to the court. Upon the coming in of the report the court may confirm the sale, and the clerk shall then enter satisfaction of the judgment to the extent of the sum bid, less expenses and costs, and execution may issue for the balance. Redemption may be made as in case of sales under a power, that is, for one year.[2] After the expiration of the time allowed for redemption, a final decree is entered that the title is in the purchaser free of all redemption, and this decree being recorded passes the title to the property as against the parties. Any surplus is subject to the order of the court for the benefit of the person entitled to it. When the action of foreclosure is for an instalment due, it may be dismissed on payment before judgment of the amount due; or, after judgment, proceedings may be stayed, to be enforced by further order upon subsequent default.

The mortgagee, or any one claiming under him, may fairly and in good faith bid off the premises at said sale; and in such case the statement of such fact in the report of sale shall have the same effect as a receipt for money paid upon a sale for cash.

Whenever possession of lands, foreclosed as aforesaid, is wrong-

[1] G. S. 1878, ch. 81, §§ 27–43.

[2] See § 1743 for provisions respecting certificate of sale and mode of redemption.

fully withheld after final decree, the court may compel delivery of possession to the party entitled thereto by order directing the sheriff to effect such delivery.

A strict foreclosure may be decreed in cases where such remedy is just or appropriate; but in such case no final decree can be rendered until the lapse of one year after the judgment determining the amount due on the mortgage.[1]

1344. Mississippi. — Foreclosure is under the jurisdiction of courts of equity. Reference is made to the clerk of court, or to a master, to compute and report the amount due on the mortgage.[2] The bill may be maintained for an instalment of the mortgage debt before the balance of it becomes due; but the whole debt may be included in the decree if it becomes due before the final hearing.[3] The decree may direct the sale of all the mortgaged property, or of so much of it as may be necessary to pay the debt and costs. There is no redemption after sale.

1345. Missouri.[4] — Foreclosure is by petition in the circuit

[1] G. S. 1878, ch. 81, § 43; Wilder *v.* Haughey, 21 Minn. 101, per Berry, J.: "The cases are very rare in which a strict foreclosure should be adjudged."

[2] Beville *v* McIntosh, 41 Miss. 516.

[3] Magruder *v.* Eggleston, 41 Miss. 284.

[4] R. S. 1879, ch. 52, §§ 3297–3308, 3314. For sales under powers, see § **1745**.

This is a statutory proceeding, and is governed by the rules of proceedings at law and not by those in equity. Thayer *v.* Campbell, 9 Mo. 280. These statutory provisions are very similar to those of other states which are there enforced in equity. The courts have sometimes found it a matter of uncertainty whether a foreclosure suit in a particular instance is under the statute, or under the jurisdiction of a court of equity, it being the general opinion, that, notwithstanding the statutory remedy, a party may pursue his rights in a court of chancery. Although a petition was addressed to the judge "in chancery sitting," and contained language peculiar to bills in equity, yet, the mode of proceeding having been that prescribed by the statute, it was regarded as a statutory proceeding. The chief distinction between the two modes is this, that in equity there can be no judgment for a deficiency, while this is provided for by the statute. Riley *v.* McCord, 24 Mo. 265; Fithian *v.* Monks, 43 Mo. 502.

The statute does not do away with the chancery jurisdiction of the United States Circuit Court of a proceeding to foreclose a mortgage in Missouri. Keith *v.* Bingham, 10 S. W. Rep. 32.

A judgment for the residue of the debt not satisfied by the mortgage can be rendered only against the mortgagor or his personal representative; and cannot be rendered against a purchaser who has assumed the payment of the mortgage as a part of the consideration of purchase. This proceeding being purely statutory cannot be extended beyond the express provisions of the statute. Fithian *v.* Monks, *supra.*

In some cases a foreclosure may be had in equity when no remedy can be had under the statute, as in case of a deed made by mistake to the grantor himself, to be void upon the payment of a debt by him; it cannot be treated as a mortgage in a court of law, but in equity may be reformed and foreclosed upon the same bill. Rackliffe *v.* Seal, 36 Mo. 317. And so also on a bill in equity to redeem, the decree may be that on failure to redeem

court against the mortgagor and the actual tenants or occupiers of the real estate, setting forth the substance of the mortgage deed, and praying that judgment may be rendered for the debt or damages, and that the equity of redemption may be foreclosed, and the property sold to satisfy the amount due. The petition may be filed in any county where any part of the mortgaged premises is situated.[1] In case of the death of the mortgagee or his assignee, or of the mortgagor, either before or after the action is brought, the personal representatives of the deceased must be made a party to the suit; and when the personal representative of the mortgagor is made a party to the suit, and the property is insufficient to satisfy the debt and costs, as to the residue the judgment has the effect of a judgment against the executor or administrator as such.[2] Any person claiming an interest in the mortgaged property may, on motion, be made defendant in such proceedings.[3] When the mortgagor is not summoned, but notified by publication, and has not appeared, the judgment against him is for the debt and damages, or damages found to be due, and costs, to be levied off the mortgaged property described as in the mortgage. When he has been duly summoned, or appears in the suit, the judgment further provides that if the mortgaged property be not sufficient to satisfy the debt and damages, or damages and costs, then the residue shall be levied off other goods, chattels, lands, and tenements of the mortgagor.

The execution is a special *fieri facias*, and is served and returned as executions in ordinary civil suits. The purchaser at a foreclosure sale takes a title against the parties to the suit, but he cannot set it up against the subsisting equities of those who are not parties.

If redemption be made by payment to the officer before sale,

within the time limited the property shall be sold, this being in such case a foreclosure in equity. Davis *v.* Holmes, 55 Mo. 349.

The more common form of security in this state is a trust deed or a power of sale mortgage. These may be foreclosed under the statute, as well as under the powers in these instruments.

[1] Objection that the suit is not brought in the county where the premises are situated, though in the proper court, must be taken before plea, and will be waived by pleading to the merits. Choteau *v.* Allen, 70 Mo. 290.

[2] Perkins *v.* Woods, 27 Mo. 547. His heirs are not necessary parties.

[3] They are allowed to become parties so that they may protect their own interests, not the interests of others. Wall *v.* Nay, 30 Mo. 494. One of several mortgagees may proceed to foreclose without making the other mortgagees parties to the petition. He has no right to join them, but they may come in voluntarily. Thayer *v.* Campbell, 9 Mo. 280.

the officer makes a certificate, which is acknowledged and recorded in the office where the mortgage is recorded, and has the same effect as satisfaction entered on the margin. There is no redemption after sale.

1346. **Montana Territory.**[1] — An action for the foreclosure of a mortgage of real property must be tried in the county in which the subject of the action or some part of it lies; unless the property is situated partly in one county and partly in another, in which case the plaintiff may select either county.[2] There is but one action for the recovery of any debt, or the enforcement of any rights secured by mortgage upon real estate. In actions for the foreclosure of mortgages the court has the power by its judgment to direct a sale of the incumbered property, or as much as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court, and expenses of the sale, and the amount due the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment is docketed for such balance against the defendant personally liable for the debt, and thus becomes a lien on the real estate of such judgment debtor. Any party not appearing on record need not be made a party to the suit. If there be a surplus, it is paid to the person entitled to it, and in the mean time it is to be deposited in court. If the debt be not all due, sufficient of the property is sold to satisfy the amount due, interest, and costs, and the court may on motion order a further sale. But if the property cannot be sold in portions without injury, the whole may be sold, and the entire debt with interest and costs paid, there being a proper rebate of interest when the part not due does not bear interest.

1347. **Nebraska.**[3] — All petitions for the foreclosure or satisfaction of mortgages shall be filed in the district court in chancery where the mortgaged premises are situated.

The court shall have power to decree a sale of the mortgaged premises, or such part thereof as may be sufficient to discharge the amount due on the mortgage, and the cost of suit.

The court shall not only have the power to decree and compel the delivery of the possession of the premises to the purchaser

[1] Code of Civil Procedure 1877, §§ 56, 346–348.

[2] Comp. Stats. 1887, p. 71, § 56; p. 158, §§ 358–360.

[3] Comp. Stats. 1885, Code of Civ. Procedure, 845–861. As to affidavit for service by publication, see Fulton *v.* Levy 32 N. W. Rep. 307.

thereof, but on the coming in of the report of sale the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary execution, as in other cases, against other property of the mortgagor.

After such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage or any part thereof, unless authorized by the court.

If the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the petition, and the court may decree payment of the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases.

Upon filing a petition for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected and paid.

If it appear that any judgment has been obtained in a suit at law for the money demanded by such petition, or any part thereof, no proceedings shall be had in such case, unless, to an execution against the property of the defendant in such judgment, the sheriff or other proper officer shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises.[1]

All sales of mortgaged premises under a decree in chancery shall be made by a sheriff, or some other person authorized by the court in the county where the premises or some part of them are situated; and in all cases where the sheriff shall make such sale he shall act in his official capacity, and he shall be liable on his official bond for all his acts therein, and shall receive the same

[1] The petition must show whether there has been a suit at law, and whether any part of the debt has been collected. Simmons Hardware Co. *v.* Brokaw, 7 Neb. 405. As to publication of notice of sale, see Drew *v.* Kirkham, 8 Neb. 477; Parrat *v.* Neligh, 7 Neb. 456.

compensation as is provided by law for like services upon sales under speculation.

Deeds shall thereupon be executed by such sheriff, which shall vest in the purchaser the same estate that would have vested in the mortgagee if the equity of redemption had been foreclosed, and no other or greater; and such deeds shall be as valid as if executed by the mortgagor and mortgagee, and shall be an entire bar against each of them, and all parties to the suit in which the decree for such sale was made, and against their heirs respectively, and all persons claiming under such heirs.

The proceeds of every sale made under a decree in chancery shall be applied to the discharge of the debt adjudged by such court to be due, and of the costs awarded, and if there be any surplus it shall be brought into court for the use of the defendant or of the person entitled thereto, subject to the order of the court.

If such surplus or any part thereof shall remain in said court for the term of three months without being applied for, the court may direct the same to be put out at interest, under the direction of the court, for the benefit of the defendant, his representatives or assigns, to be paid to them by the order of such court.

Whenever a petition shall be filed for the satisfaction or foreclosure of any mortgage, upon which there shall be due any interest on any portion or instalment of the principal, and there shall be other portions or instalments to become due subsequently, the petition shall be dismissed upon the defendant bringing into court, at any time before the decree of sale, the principal and interest due, with costs.

If, after a decree for sale entered against a defendant in such case, he shall bring into court the principal and interest, with costs, the proceedings in the suit shall be stayed, but the court shall enter a decree of foreclosure and sale, to be enforced by a further order of the court, upon a subsequent default in the payment of any portion or instalment of the principal, or any interest thereafter to become due.

If the defendant shall not bring into court the amount due, with costs, or if for any other cause a decree shall pass for the complainant, the court may direct a reference to a sheriff to ascertain and report the situation of the mortgaged premises, or may determine the same on oral or other testimony; and if it shall appear that the same can be sold in parcels, without injury

to the parties, the decree shall direct so much of the mortgaged premises to be sold as will be sufficient to pay the amount then due on such mortgage, with costs, and such decree shall remain a security for any subsequent default.

If, in the case mentioned in the preceding section, there shall be any default subsequent to such decree in the payment of any portion or instalment of the principal, or any interest due upon such mortgage, the court may, upon the petition of the complainant, by a further order founded upon such first decree, direct a sale of so much of the mortgaged premises to be made, under such decree, as will be sufficient to satisfy the amount so due, with the costs of such petition and the subsequent proceedings thereon, and the same proceedings may be had as often as a default shall happen.[1]

If, in any of the foregoing cases, it shall appear to the court that the mortgaged premises are so situated that a sale of the whole will be most beneficial to the parties, the decree shall, in the first instance, be entered for the sale of the whole premises accordingly.

In such case the proceeds of such sale shall be applied as well to the interest, portion, or instalment of the principal due as towards the whole or residue of the sum secured by such mortgage and not due and payable at the time of such sale, and if such residue do not bear interest, then the court may direct the same to be paid, with a rebate of the legal interest for the time during which such residue shall not be due and payable; or the court may direct the balance of the proceeds of such sale, after paying the sum due, with costs, to be put out at interest for the benefit of the complainant, to be paid to him as the instalments or portions of the principal or interest may become due, and the surplus for the benefit of the defendant, his representatives or assigns, to be paid to them on the order of the court.

1348. Nevada.[2] — Only one action can be had for the recovery of the debt or enforcement of the mortgage.[3] In such action judgment is rendered for the amount found due, and for a sale of the property, and application of the proceeds to payment of the

[1] This provision has no application in an action for the foreclosure of a mortgage, when the whole amount of the debt secured is due. It was not intended to authorize the court to relieve a party from a forfeiture. Beisel *v.* Artman, 10 Neb. 181.

[2] G. S. 1885, §§ 3270–3272. When suit may be brought. Laws 1885, ch. 95.

[3] It would seem that this provision would not prevent a sale under a power. Bryant *v.* Carson River Lumbering Co. 3 Nev. 313.

debt; execution may issue for any balance there may appear to be due by the sheriff's return. Any surplus the court may cause to be paid to the persons entitled to it, and in the mean time may direct it to be deposited in court. If the debt be not all due, only so much of the property as is necessary to satisfy the amount due shall be sold; but if it cannot be sold in portions without injury, the whole may be ordered to be sold in the first instance and the entire debt paid, with a proper rebate of interest.

A certificate of the sale is made by the sheriff, and after the time allowed for redemption has expired a deed is executed. The debtor, or his successor in interest, may redeem within six months on paying the amount of the bid, in the money or currency specified in the judgment, with eighteen per cent. thereon in addition, with any amount paid for taxes; and also, if the purchaser be a creditor having a lien prior to that of a redemptioner other than the judgment under which the purchase was made, the amount of such lien, with interest. There may be successive redemptions by judgment or mortgage creditors within sixty days after the last redemption.[1]

The statute in this state entirely changes the common law rule that the mortgagee may pursue all his remedies simultaneously, by action upon the debt, by bill to foreclose, and by ejectment. Here ejectment is wholly forbidden. No action of debt can be resorted to unless the mortgage lien be abandoned. The remedy against the property is confined to foreclosure and sale.[2] A judgment for the debt cannot be enforced until the remedy against the property is exhausted. The plaintiff may if he choose take simply a decree in equity, without a common law judgment, and then if the property falls short of paying the entire debt he may afterwards have execution for the balance. If a common law judgment be taken in the first instance, it constitutes no lien upon other property until a deficiency is duly ascertained and docketed.[3] Equity has jurisdiction of a bill to foreclose, although the debt has been presented and allowed against the estate of the deceased mortgagor.[4]

1349. New Hampshire. — Foreclosure may be had by bill in equity when the complicated relations of the parties render proceedings at law inadequate.[5] The modes of foreclosure in com-

[1] G. S. 1885, §§ 3253–3258.
[2] Hyman *v.* Kelly, 1 Nev. 179.
[3] Weil *v.* Howard, 4 Nev. 384.
[4] Corbett *v.* Rice, 2 Nev. 330.
[5] Aiken *v.* Gale, 37 N. H. 501, 510.

mon use are by entry under process of law; by peaceable entry and publication of notice of the same; or by advertisement when the mortgagee is already in possession. In either case, actual peaceable possession continued for one year from the time of entry, or from the day specified in the notice in the latter mode, forever bars the right of redemption.[1]

1350. New Jersey. — Foreclosure is under the general jurisdiction of the courts of chancery; but where all the premises are situate in the same county, the circuit court of the county has the same jurisdiction and power as the court of chancery.[2] The court may decree a sale of the mortgaged premises, or of such part of them as shall be sufficient to discharge the debt and costs; which sale shall be made either by one of the masters of the court or by the sheriff of the county where the premises are situated by virtue of a writ of *fieri facias*. The officer making the sale executes the proper deed. An absent defendant may at any time before the sale cause his appearance to be entered, and upon the payment of costs the proceedings may be stayed, and may afterwards go on as if his appearance had been duly entered in the beginning. When a decree is had for the non-payment of an instalment of interest or principal before the whole mortgage debt is due, and it shall appear to the court that a part of the mortgaged premises cannot be sold to satisfy the amount without material injury to the remaining part, and that it is just and reasonable that the whole should be sold together, the court may decree a sale of the whole, and apply the proceeds of the sale, or so much as may be necessary, as well to the payment of the amount then due as to the payment of the whole or residue of the debt, making a proper rebate of interest upon the part of the debt not then due and payable. When the defendant has entered an appearance but has filed no answer, execution for sale is not issued until the expiration of such time as may be fixed by the rules of the court, not less than two, nor more than four, months.[3] If the mortgagor or any of those holding under him has absconded, or is

[1] G. S. 1867, ch. 122; G. L. 1878, ch. 136, §§ 14–16. See §§ **1241–1243**. The time for redemption will not be extended to enable a party to ascertain whether it is for his interest to exercise it. Eastman *v.* Thayer, 60 N. H. 405.

[2] Nixon's Dig. 1868, pp. 608, 612; Rev. 1877, p. 705. In an action of ejectment for the recovery of mortgaged lands, and in actions upon the bond, a tender of the sum due with costs is a satisfaction of the mortgage, and the mortgagee may thereupon be compelled to reconvey. R. S. 1877, pp. 701, 702.

[3] Rev. 1877, pp. 116–118, §§ 71–77.

unknown to the holder of the mortgage, service may be made by publication.[1]

[1] Laws 1873, p. 161; R. S. 1877, p. 704.

By a recent statute, Laws 1880, ch. 170, amended in Laws 1881, ch. 147, Supp. 1886, pp. 489, 490, it is provided that in all proceedings to foreclose mortgages no decree shall be rendered for any balance of money which may be due complainant over and above proceeds of the sale or sales of the mortgaged property, and no execution shall issue for the collection of such balance.

In all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be first to foreclose the mortgage, and if at the sale of the mortgaged premises under said foreclosure proceedings the said premises should not sell for a sum sufficient to satisfy said debt, interest, and costs, then and in such case it shall be lawful to proceed on the bond for the deficiency, and that all suits on said bond shall be commenced within six months from the date of the sale of said mortgaged premises, and judgment shall be rendered and execution issue only for the balance of debt and costs of suit. If after the foreclosure and sale of any mortgaged premises the person who is entitled to the debt shall recover a judgment in a suit on said bond for any balance of debt, such recovery shall open the foreclosure and sale of said premises, and the person against whom the judgment has been recovered may redeem the property by paying the full amount of money for which the decree was rendered, with interest to be computed from the date of said decree, and all costs of proceedings on the bond; provided that a suit for redemption is brought within six months after the entry of such judgment for the balance of the debt.

In all foreclosure proceedings the sheriff or other officer who may be directed to sell any mortgaged premises shall, after making such sale, report the same within five days thereafter to the court out of which an execution or order to sell is issued, stating the name of the purchaser or purchasers and the price obtained, and, if the said court or a judge thereof shall approve of such sale, they shall confirm the same as valid, effectual in law, and shall by rule of court allowed in open court, or by a judge thereof at chambers, direct the said sheriff or other officer to execute good and sufficient conveyance in law to the purchaser or purchasers for the mortgaged premises so sold; provided, that no sale of mortgaged premises shall be confirmed by the court, or further proceedings be had, until the court or such judge is satisfied by evidence that the property has been sold at the highest and best price the same would then bring in cash, and such evidence may be in the form of affidavits.

This act applies to mortgages given before the date of its passage; and it is not unconstitutional as taking away a remedy for enforcing a contract which existed when the contract was made, because a more efficacious remedy of the same sort remains at law. Newark Sav. Inst. *v.* Forman, 33 N. J. Eq. 436; Naar *v.* Union & Essex Land Co. 34 N. J. Eq. 111.

But grantees who have assumed the payment of a mortgage are still liable to the mortgagee if a deficiency remain after foreclosure, and their liability may be enforced by an independent suit in equity. Allen *v.* Allen, 34 N. J. Eq. 493. Chancellor *v.* Traphagen, 41 N. J. Eq. 369; 7 Atl. Rep. 505.

The object of this provision is to prevent a sacrifice of the property, so far as it may be done, by requiring proof that the property brought the best price then obtainable. It was not intended that the court should set aside sales until an adequate price should be obtained for the property. Delaware, Lackawanna & Western R. R. Co. *v.* Scranton, 34 N. J. Eq. 429. The owner of an equity of redemption whose property has been assigned for the benefit of his creditors has such an interest that he may apply under this act for

When a foreclosure is sought for an instalment only of the debt, the remainder not being due, the court will not direct the whole premises to be sold, if they can be divided; and if a decree has been entered for the sale of the whole premises when they are manifestly divisible, the court may in its discretion regulate the execution of the decree.[1]

When no one is necessarily interested in the mortgaged premises other than the mortgagor and mortgagee, and the premises are subject to one mortgage only, foreclosure may be had by *scire facias* in the supreme court or court of common pleas of the county where the lands lie.[2] Under this process, after judgment, the premises are sold in the same manner as under other executions for the sale of real estate, and conveyed to the purchaser.[3] If there is any surplus after paying the mortgage debt, it is paid into court by the sheriff or other officer making the sale; and the court orders it to be applied in satisfaction of any judgment or other lien upon the property, if there be any, but otherwise to be paid by the debtor.

There is no redemption after sale.

1351. New York.[4] — In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, the court must direct the sale of the property mortgaged, or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action.[5]

a resale. Delaware, Lackawanna & Western R. R. Co. *v.* Scranton, 34 N. J. Eq. 429.

One claiming an interest in the premises, who has been deprived of an opportunity to protect that interest through the neglect of his counsel, may apply for a resale. Mut. Benefit L. Ins. Co. *v.* Gould, 34 N. J. Eq. 417.

Prior to the statute of 1880, the chancellor might decree the payment of any excess of the mortgage debt above the proceeds of sale, by any of the parties to the suit who may be liable for it either at law or in equity. Nixon's Dig. 1868, p. 119; Act of March 29, 1866; Rev. 1877, p. 118, § 76. The practice in such cases was to issue an order after sale, reciting the proceedings under the execution, and the existence and amount of the deficiency as ascertained by the statement of the officer by whom the decree of sale was executed, and to award an execution to make the amount with interest and costs of the order and execution. Mut. Life Ins. Co. Co. *v.* Southard, 25 N. J. Eq. 337.

[1] Am. Life & Fire Ins. & Trust Co. *v.* Ryerson, 6 N. J. Eq. (2 Halst.) 9.

[2] Nixon's Dig. 1868, p. 609; Rev. 1877, p. 703.

[3] As to advertising and adjourning the sale, see Nixon's Dig. 1868, p. 866; Hewitt *v.* Montclair Ry. Co. 25 N. J. Eq. 392.

[4] Laws 1880, vol. 2, pp. 41–44, §§ 1626–1637 of Code of Civil Procedure 1880.

[5] Upon final judgment the plaintiff, in addition to the other costs allowed, is entitled to the following percentage upon the amount due upon the mortgage: Upon a sum not exceeding $200, ten per centum; upon an additional sum, not exceeding $400, five per centum; upon an additional sum, not exceeding $1,000, two per

Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action; and if he has appeared, or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds pursuant to the directions contained therein.[1]

While an action to foreclose a mortgage upon real property is pending, or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt without leave of the court in which the former action was brought.[2]

The complaint in an action to foreclose a mortgage upon real property must state whether any other action has been brought to recover any part of the mortgage debt, and if so whether any part thereof has been collected.

Where final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage unless an execution against the property of the defendant has been issued upon the judgment to the sheriff of the county where he resides, if he resides within the state, or, if he resides without the state, to the sheriff of the county where the judgment roll is filed, and has been returned wholly or partly unsatisfied.[3]

centum. If the action be settled before judgment, the plaintiff is entitled, upon the amount received in settlement, to one half the above rates. When a part of the mortgage debt is not due, if the final judgment directs a sale of the whole property, the percentages are computed upon the whole sum unpaid upon the mortgage. If the judgment directs a sale of a part only, the percentages are computed upon the sum actually due; and upon a sale of the remainder the percentages are computed upon that amount; but the aggregate of the percentages cannot exceed the sum which would have been allowed if the entire sum secured had been due when final judgment was rendered.

The court may also in its discretion allow a sum not exceeding two and one half per centum upon the sum due upon the mortgage, and not exceeding in the aggregate $200. Code of Civil Procedure 1880, §§ 3252, 3253.

[1] A contingent decree for the payment of any deficiency may be made before sale. McCarthy *v.* Graham, 8 Paige, 480.

The master's deed passes the title from the time of its delivery. Fuller *v.* Van Geesen, 4 Hill, 171.

[2] A suit at law need not be actually discontinued before filing the bill; but upon the filing of it the suit is suspended. Williamson *v.* Champlin, 8 Paige, 70.

[3] This prohibition is not limited to a suit against the mortgagor, but applies to a suit against a surety, or one who has assumed to pay the mortgage. Pattison *v.* Powers, 4 Paige, 549. And to a suit upon a guaranty of the mortgage. McKernan *v.* Robinson, 84 N. Y. 105. But it does not apply to a suit upon a guaranty of the mortgage debt. Schaaf *v.* O'Brien, 8

The plaintiff must, at least twenty days before a final judgment directing a sale is rendered, file, in the clerk's office of each county where the mortgaged property is situated, a notice of the pendency of the action, which must specify, in addition to other particulars required, the date of the mortgage, the parties thereto, and the time and place of recording it.[1]

A conveyance upon a sale made pursuant to a final judgment, in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate only that would have vested in the mortgagee if the equity of redemption had been foreclosed.[2] Such a conveyance is as valid as if it were executed by the mortgagor and mortgagee, and is an entire bar against each of them, and against each party to the action who was duly summoned, and every person claiming from, through, or under a party by title accruing after the filing of the notice of the pendency of the action, as above prescribed.

If there is any surplus of the proceeds of the sale after paying the expenses of the sale, and satisfying the mortgage debt and the costs of the action, it must be paid into court for the use of the

Daly, 181. In case of a guaranty of collection, it is implied that the guarantor is not liable until the remedy upon the security has been exhausted. Baxter *v.* Smack, 17 How. Pr. 183, 184.

If the plaintiff untruly aver that no proceedings have been had, the defendant may plead a judgment at law without averring that no execution has been issued on it. North River Bank *v.* Rogers, 8 Paige, 648. See, also, as to the effect of a judgment, Grosvenor *v.* Day, Clarke, 109.

The mere commencement of proceedings at law, if no judgment has been recovered, will not prevent the filing of a bill to foreclose. But the suit cannot be prosecuted without the permission of court. This may be given in some cases, as, for instance, where the suit is against a third person liable for the debt, but who is not a party to the bill of foreclosure, and might not be liable to a decree for the deficiency if he were a party, and where the premises are not sufficient to pay the debt. The court will permit the suit at law to proceed so far as to test the validity of a defence set up, but will not allow an execution to be taken out on the judgment without further order of court. Suydam *v.* Bartle, 9 Paige, 294. See, also, Thomas *v.* Brown, Ib. 370; Engle *v.* Underhill, 3 Edw. 249.

If an action has been commenced without previous authority, the court may by subsequent order made *nunc pro tunc* grant permission. McKernan *v.* Robinson, 84 N. Y. 105.

[1] A decree without proof of such notice, though irregular, is not void. Potter *v.* Rowland, 8 N. Y. 448; Curtis *v.* Hitchcock, 10 Paige, 399; White *v.* Coulter, 1 Hun (N. Y.), 357.

[2] When the sale is made by a master, no report or confirmation is necessary before making the deed. Monell *v.* Lawrence, 12 Johns. 521.

If the sale be made by a referee appointed for the purpose, his duties are ministerial in their nature, and he must follow the terms of sale, and is personally liable if he disregards them. Day *v.* Bergen, 53 N. Y. 404.

person or persons entitled thereto.[1] If any part of the surplus remains in court for the period of three months, the court must, if no application has been made therefor, and may if an application therefor is pending, direct it to be invested at interest for the benefit of the person or persons entitled thereto, to be paid upon the direction of the court. Where an action is brought to foreclose a mortgage upon real property, upon which a portion of the principal or interest is due, and another portion of either is to become due, the complaint must be dismissed, without costs against the plaintiff, upon the defendant paying into court, at any time before a final judgment directing a sale is rendered, the sum due, and the plaintiff's costs.

In a case specified in the last section, if, after a final judgment directing a sale is rendered, but before the sale is made, the defendant pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any, all proceedings upon the judgment must be stayed; but upon a subsequent default in the payment of principal or interest, the court may make an order directing the enforcement of the judgment for the purpose of collecting the sum then due.[2]

Where the mortgage debt is not all due, and the mortgaged property is so circumstanced that it can be sold in parcels without injury to the interests of the parties,[3] the final judgment must direct that no more of the property be sold, in the first place, than is sufficient to satisfy the sum then due, with the costs of the action and expenses of the sale;[4] and that upon a subsequent default in the payment of principal or interest, the plaintiff may apply for an order directing the sale of the residue, or of so much thereof as is necessary to satisfy the amount then due, with the costs of the application and the expenses of the sale. The plaintiff may apply for and obtain such an order as often as a default happens.[5]

[1] Bostwick *v.* Pulver, 3 How. Pr. 69.

[2] See, also, Brinckerhoff *v.* Thallhimer, 2 Johns. (N. Y.) Ch. 486; Ellis *v.* Craig, 7 Ib. 7.

[3] An order of sale will not be made without reference. Ontario Bank *v.* Strong, 2 Paige, 301.

If the master has reported that the premises cannot be sold in parcels, on another instalment becoming due a second reference is not necessary. Knapp *v.* Burnham, 11 Paige, 330.

[4] The master is not bound to sell in parcels unless the decree so directs. Woodhull *v.* Osborne, 2 Edw. 614; Lansing *v.* Capron, 1 Johns. Ch. 617.

[5] If the mortgage be conditioned for the support of the mortgagee during life, no decree for subsequent breaches can be

If in such case it appears that the mortgaged property is so circumstanced that a sale of the whole will be most beneficial to the parties, the final judgment must direct that the whole property be sold;[1] that the proceeds of the sale, after deducting the costs of the action and the expenses of the sale, be either applied to the satisfaction of the whole sum secured by the mortgage, with such a rebate of interest as justice requires, or be first applied to the payment of the sum due, and the balance, or so much thereof as is necessary, be invested at interest for the benefit of the plaintiff, to be paid to him from time to time as any part of the principal or interest becomes due.[2]

made without supplementary proceedings. Ferguson *v.* Ferguson, 2 N. Y. 360.

So where interest only is due. Brinckerhoff *v.* Thallhimer, 2 Johns. Ch. 486; Lyman *v.* Sale, Ib. 487; Campbell *v.* Macomb, 4 Johns. Ch. 534; Delabigarre *v.* Bush, 2 Johns. 490; Brevoort *v.* Jackson, 1 Edw. 447.

[1] A sale of the whole may be decreed when the mortgage is inadequate security and the mortgagor is irresponsible, although the whole debt be not due, unless the mortgagor will pay the amount due, or give security for the residue. Suffern *v.* Johnson, 1 Paige (N. Y.), 450. The court may order a sale of the whole premises, with a view, not to the satisfaction of the mortgage, but to the better protection of the subsequent parties in interest. Livingston *v.* Mildrum, 19 N. Y. 440, 443; Snyder *v.* Stafford, 11 Paige, 71; Deforest *v.* Farley, 4 Hun (N. Y.), 640.

So when there is a second mortgage on the same premises, which is due, upon the foreclosure of the first mortgage, although a part only of that is due, the court will direct a sale of the whole premises, or so much as will satisfy the whole of both mortgages, unless the defendant pay the amount due with costs before sale. Hall *v.* Bamber, 10 Paige (N. Y.), 296. Although the premises consist of two or more parcels, if they have previously been held, used, and conveyed together as one farm, a sale of the whole in one parcel is good. Anderson *v.* Austin, 34 Barb. 319; and see Wolcott *v.* Schenck, 23 How. Pr. 385; Woodhull *v.* Osborne, 2 Edw. 614.

[2] The judgment may direct the delivery of the possession of the property to the person entitled thereto. If a party, or his representative or successor, who is bound by the judgment, withholds possession from the person thus declared to be entitled thereto, the court, besides punishing the disobedience as a contempt, may in its discretion, by order, require the sheriff to put that person into possession. Such an order must be executed as if it was an execution for the delivery of the possession of the property. Code of Civil Procedure 1880, § 1675.

The officer making the sale must, out of the proceeds, unless the judgment otherwise directs, pay all taxes, assessments, and water rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments, or water rates which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale, within the meaning of that expression, as used in any provision of articles second, third, or fourth of this title. Code of Civil Procedure 1880, § 1676.

The sale must be at public auction to the highest bidder. Notice of sale must be given as follows: 1. A written or printed notice thereof must be conspicuously fastened up, at least forty-two days before the sale, in three public places in the town or city where the sale is to take place, and also in three public places in the town or city where the property is situated, if the sale is to take place in another

1352. North Carolina. — Mortgages are foreclosed by action in the nature of a bill in equity.[1] The suit must be brought in the county in which the premises or some part of them are situated.[2] If any party having an interest in the mortgaged premises or a lien upon them is unknown to the plaintiff, and his residence cannot with reasonable diligence be ascertained, upon affidavit of such fact the court grants an order that the notice be served by publishing the same for six weeks, once in each week successively, in a newspaper printed in the county where the premises lie, if there be any; otherwise in some newspaper printed in Raleigh, and in one printed in the county where the premises lie.[3] There is no redemption after sale. Judgment may be rendered against any one personally liable for the mortgage debt for a deficiency after the sale, though this could not be done under the former equity practice.[4]

1353. Ohio.[5] — An action for the sale of real property under

town or city. 2. A copy of the notice must be published, at least once in each of the six weeks immediately preceding the sale, in a newspaper published in the county, if there is one; or, if there is none, in the newspaper printed at Albany, in which legal notices are required to be published.

In case the property is situated wholly or partly in a city in which a daily newspaper is published, notice must be given by publishing notice of the sale at least twice in each week for the three successive weeks immediately preceding the sale in one, or, in the city of New York or the city of Brooklyn in two, of such papers. Notice of a postponement of the sale must be published in the paper or papers wherein the notice of sale was published. The terms of the sale must be made known at the time of sale; and if the property, or any part thereof, is to be sold subject to a right of dower, charge, or lien, that fact must be declared at the time of sale. If the property consists of two or more distinct buildings, farms, or lots, they must be sold separately; except that where two or more buildings are situated on the same city lot, and access to one is obtained through the other, they may be sold together. Code of Civil Procedure 1880, § 1678; Code of Civil Procedure 1878, § 1434.

A foreclosure sale of two buildings is not invalidated because they have been sold together. The word "must" in this provision is directory merely. Wallace *v.* Ferly, 6 How. Pr. 225.

[1] All distinction between actions at law and suits in equity is abolished. Constitution, sec. 1, art. 14; Battle's Revisal (1873), 137.

[2] Code 1883, § 221. The Superior Court has jurisdiction of the action although the debt secured be less than two hundred dollars. The action is not founded on the contract merely, but on the equity growing out of the relation of mortgagor and mortgagee. The enforcement of such an equity does not fall within the jurisdiction of a justice, because the sum secured on the contract would be cognizable before him. Murphy *v.* McNeill, 82 N. C. 221.

[3] Code 1883, § 221.

[4] Fleming *v.* Sitton, 1 Dev. & Bat. Eq. 621.

[5] The distinction between actions at law and suits in equity was abolished in 1853; but the mode of proceeding is in accordance with general equity principles. The former statute remedy by *scire facias* did

a mortgage must be brought in the county in which the property lies.[1]

When a mortgage is foreclosed a sale of the premises shall be ordered; and when the premises to be sold are in one or more tracts, the court may direct the officer who makes the sale to subdivide, appraise, and sell the same in parcels, or to sell any one of the tracts as a whole. When the mortgaged property is situate in more than one county, the court may order the sheriff or master of each to make sale of the property in his county, or may direct one officer to sell the whole; the court may direct that the property, when it consists of a single tract, be sold as one tract, or in separate parcels, and shall direct whether appraisers shall be selected for each county, or one set for all; and shall also direct whether publication of the sale shall be made in all the counties or in one county only.[2]

When premises are ordered to be sold, and, having been twice advertised and offered for sale, remain unsold for want of bidders, the court from which the order of sale issued shall, on motion of the plaintiff or defendant, order a new appraisement, and may also order that the land be sold on time as follows: One third cash in hand, one third in nine months from the day of sale, and the remaining third in eighteen months from the day of sale, the deferred payments to draw six per cent. interest, and to be secured by mortgage on the premises.[3]

The plaintiff may also ask in his petition for a judgment for the money claimed to be due; and such proceedings shall be had and judgment rendered as in other civil actions for the recovery of money only.[4]

There is no redemption after sale.

1354. Oregon.[5] — Mortgages are foreclosed by suit in equity and the property adjudged to be sold.[6] If a promissory note or

not preclude foreclosure by bill in equity. Anonymous, 1 Ohio, 235. The system of procedure by *scire facias* was adopted by the territorial government in 1795, from the Statutes of Pennsylvania. Biggerstaff *v.* Loveland, 8 Ohio, 45.

[1] R. S. 1880, § 5022.

[2] R. S. 1880, §§ 5316, 5317.

[3] R. S. 1880, § 5417.

[4] Annotated Laws 1887, §§ 414–422. See Keller *v.* Wenzell, 23 Ohio St. 579; Wood *v.* Stanberry, 21 Ohio St. 142; Hamilton *v.* Jefferson, 13 Ohio, 427; Myers *v.* Hewitt, 16 Ohio, 449, 456. There may be judgment against all the makers of the note, although the mortgage is executed by only a part of them. King *v.* Safford, 19 Ohio St. 587.

[5] G. L. (1872), p. 196.

[6] The jurisdiction of such suits is vested in the circuit courts. But these courts have no jurisdiction after the death of the mortgagor. Verdier *v.* Bigne, 19 Pac. Rep. 64.

other personal obligation for the payment of the debt has been given, the court also decrees a recovery of the amount of such debt. Any person having a lien subsequent to the plaintiff upon the same property, and any person who has given a promissory note or other personal obligation for the payment of the debt, must be made a defendant in the suit;[1] and any person having a prior lien may be made defendant at the option of the plaintiff. Any defendant having a lien may have a decree in the same manner as if he were plaintiff.

When a decree is given foreclosing two or more liens upon the same property or any portion thereof in favor of different persons not united in interest, such decree must determine and specify the order of time, according to their prority, in which the debts secured by such liens shall be satisfied out of the proceeds of the sale of the property. The decree may be enforced by execution as an ordinary decree for the recovery of money, except that when a decree of foreclosure and sale is given an execution may issue thereon against the property adjudged to be sold.[2] If the decree is in favor of the plaintiff only, the execution may issue as in ordinary cases; but if it be in favor of different persons, not united in interest, it shall issue upon the joint request of such persons, or upon the order of the court or judge thereof, on the motion of either of them; when the decree is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the decree, as to the sum remaining unsatisfied the decree may be enforced by execution as in ordinary cases. When in such case the decree is in favor of different persons not united in interest, it shall be deemed a separate decree as to such persons, and may be enforced accordingly.

During the pendency of an action of law for the recovery of a debt secured by any lien, a suit cannot be maintained for the foreclosure of such lien, nor thereafter, unless judgment be given in such action that the plaintiff recover such debt or some part thereof, and an execution thereon against the property of the defendant in the judgment is returned unsatisfied in whole or in part. When a suit is commenced to foreclose a lien by which a

[1] Lauriat *v.* Stratton, 6 Sawyer, 339.

[2] The sheriff need not make a levy before proceeding to sell. He may sell premises consisting of several town lots either separately or together, in his discretion. Bank of British Columbia *v.* Page, 7 Oreg. 454.

debt is secured, which debt is payable in instalments either of interest or principal, and any of such instalments is not then due, the court shall decree a foreclosure of the lien, and may also decree a sale of the property for the satisfaction of the whole of such debt, or so much thereof as may be necessary to satisfy the instalment then due, with costs of suit; and in the latter case the decree of foreclosure as to the remainder of the property may be enforced by an order of sale in whole or in part, whenever default shall be made in the payment of the instalments not then due. If, before a decree is given, the amount then due, with the costs of suit, is brought into court and paid to the clerk, the suit shall be dismissed; and if the same be done after decree and before sale, the effect of the decree as to the amount then due and paid shall be terminated, and the execution, if any have issued, be recalled by the clerk. When an instalment not due is adjudged to be paid, the court shall determine and specify in the decree what sum shall be received in satisfaction thereof, which sum may be equal to such instalment or otherwise, according to the present value thereof.

1355. Pennsylvania. — In the case of mortgages given by corporations the Supreme Court of the commonwealth may exercise all the power and jurisdiction of a court of chancery.[1] There has never been any distinct chancery tribunal in this state, and the chancery powers conferred previous to the above statute never embraced the subject of mortgages; therefore there was no jurisdiction to decree a foreclosure or sale under a mortgage; but as the court had jurisdiction of trusts, it could in behalf of a *cestui que trust* compel trustees under a mortgage with a power of sale to execute the power according to its terms. The court declined, however, to do more than to control or direct the execution of a power of sale already conferred, and would not itself exercise the power.[2] The above provision was accordingly enacted in order that there might be a remedy more adequate for the administration of the large mortgages which corporations are in the habit of making, than was furnished by the writ of *scire facias* by which mortgages are generally foreclosed.

[1] Brightly's Purdon's Dig. 1872, 593; Act of April 11, 1862. This provision is constitutional, as applied to mortgages made before the act was passed. McCurdy's Appeal, 65 Pa. St. 290; McElrath *v.* Pittsburg & Steubenville R. R. Co. 55 Pa. St. 189.

[2] Bradley *v.* Chester Valley R. R. Co. 36 Pa. St. 141; Ashhurst *v.* Montour Iron Co. 35 Pa. St. 30.

The mode of foreclosing mortgages in other cases is by *scire facias.* When default has been made on a mortgage, the holder of the mortgage, at any time after the expiration of twelve months[1] next ensuing the last day when the mortgage money ought to be paid, or other condition performed, may sue forth a writ of *scire facias*[2] from the court of common pleas for the county or city where the lands lie, directed to the proper officer, requiring him to make known to the mortgagor, or his heirs, executors, or administrators, that he show cause why the mortgaged premises should not be seized and taken on execution for payment of the mortgage money, with interest. If the defendant appears, he may plead satisfaction of part or all of the mortgage money, or make any other lawful plea, in avoidance of the deed or debt; but if he do not appear on the day the writ is made returnable, if damages only are recoverable, an inquest is to be forthwith charged to inquire thereof, and judgment is entered that the plaintiff have execution by *levari facias;* by virtue of which the premises are taken in execution and exposed to sale and conveyed to the buyer, and the money rendered to the mortgage creditor; but for want of buyers, to be delivered to the creditor, in the same manner as land taken upon execution for other debts. When the lands are sold or delivered they are held discharged of all equity of redemption, and all incumbrances made or suffered by the mortgagor, his heirs or assigns; but before sale is made, notice must be given in writing of the time and

[1] Brightly's Purdon's Dig. 1883, pp. 596–599. This limitation may be waived in the mortgage subsequently. But the waiver must be explicit, and by the party authorized to make it; and must be in the mortgage itself, and not in the bond. Kennedy *v.* Ross, 25 Pa. St. 256; Huling *v.* Drexell, 7 Watts, 126; Walker *v.* Tracey, 1 Phila. 225; Whitecar *v.* Worrell, 1 Phila. 44; Black *v.* Galway, 24 Pa. St. 18.

[2] The mortgagee cannot proceed by *scire facias* to recover successive instalments of a mortgage debt. This remedy puts an end to the security, and disposes of the whole estate. Fickes *v.* Ersick, 2 Rawle, 166; Ewart *v.* Irwin, 1 Phila. 78. But if the mortgage provides that on a failure to pay any instalment for a certain period the whole debt should become due and collectible, *scire facias* may issue forthwith upon the default for the whole debt. Hosie *v.* Gray, 71 Pa. St. 198. The provisions of a stay law may be waived in the mortgage by express provision. Drexel *v.* Miller, 49 Pa. St. 246. Upon any default ejectment may be maintained for possession of the land. Smith *v.* Shuler, 12 S. & R. 240; Fickes *v.* Ersick, *supra;* Martin *v.* Jackson, 27 Pa. St. 504. But this process only gives possession, which may be maintained until the debt is paid. Colwell *v.* Hamilton, 10 Watts, 413, 417.

A *scire facias* does not lie upon an unsealed equitable mortgage. 12 Phila. (Pa.) 452.

place of sale in the same manner as is directed concerning sales upon execution.[1] Any surplus realized above the debt and costs must be returned by the officer to the defendant. On a reversal of the judgment under which a sale has been made, the purchaser is protected in his title, unless the process was void.[2] When an action is brought on a mortgage, a memorandum of the names of the parties and date of the action is furnished to the recorder and entered upon the record of the mortgage. An assignee of the mortgage may sue in his own name or in the name of the mortgagee for the use of the assignee; or the record may be amended after suit has been commenced, and the proper persons made parties. Mortgages of leasehold estates are foreclosed in the same manner.[3]

If the mortgagee has released a portion of the premises, the defendant in *scire facias* may plead that the balance claimed is greater than in a just proportion should be levied on the premises described in the writ.[4] In general as to the defences that may be taken, although the action be one at law, equitable defences are not necessarily excluded.[5] Any defence may be set up in this action that may be set up against the mortgage debt; as that there was no consideration, or that this was void or illegal,[6] or that the consideration has failed, as in the case of a purchase money mortgage, when the mortgagor has been ejected by reason of a paramount title in another.[7] But a purchaser of several lots of land

[1] This is a proceeding *in rem*. The effect of the sale is to extinguish the equity of redemption and transfer the estate as fully as it existed in the mortgagor before the mortgage. Hartman *v.* Ogborn, 54 Pa. St. 120. The wife's dower is barred though she did not join in the mortgage. Scott *v.* Crosdale, 2 Dall. 127. The sale must be by the sheriff of the county where the land lies. He can make the sale outside of it. Menges *v.* Oyster, 4 W. & S. 20. As to distribution of surplus, see Selden's Appeal, 74 Pa. St. 323.

The mortgagor should not be made a party, if he no longer has any interest in the property. Broomell *v.* Anderson, 8 Atl. Rep. 764.

[2] See Caldwell *v.* Walters, 18 Pa. St. 79, 84; Evans *v.* Meylert, 19 Pa. St. 402; Wilson *v.* McCullough, 19 Pa. St. 77; Burd *v.* Dansdale, 2 Binn. 80.

[3] Before this statute, after an assignment duly executed and recorded, no suit could be maintained in the name of the assignor for the use of those having the equitable interest in the mortgage. Pryor *v.* Wood, 31 Pa. St. 142. If the assignment was not formal and legal, the suit could be maintained by the assignor. Partridge *v.* Partridge, 38 Pa. St. 78; Moore *v.* Harrisburg Bank, 8 Watts, 138, 151.

[4] Brightly's Purdon's Dig. 1883, p. 480.

[5] Ewart *v.* Irwin, 1 Phila. 78; *S. C.* 7 Leg. Int. 134.

[6] Raguet *v.* Roll, 7 Ohio, 77. In this case the defence was that the consideration was in part for the forbearance of a criminal prosecution.

[7] Morris *v.* Buckley, 11 S. & R. 168. Otherwise in Illinois: McFadden *v.* Fortier, 20 Ill. 509; Wacker *v.* Straub, 88 Pa. St. 32.

having secured the unpaid purchase money by a mortgage upon one of the tracts of which he has taken a separate deed, cannot set up as a defence to the mortgage a failure of the title of the lots not included in the mortgage.[1]

This is a local action and must issue in the county where the land lies.[2] It is regarded chiefly as a proceeding *in rem*, to foreclose the mortgage and convert the security into money. It is a proceeding *in personam* only so far as notice to the parties is prescribed by the act.[3] The action is applicable to all mortgages, whether recorded or not. It is founded on the instrument itself, and not upon the record of it. The proper plea in denial of the instrument is *non est factum* and not *nul tiel record*. But on the trial an exemplification of the record may be used as evidence of the instrument itself.[4] No one except the mortgagor, or upon his death his personal representatives, is a necessary party to the action. A purchaser from the mortgagor or other terre-tenant need not be made a party to the suit; though it is the general practice to give such purchaser or tenant notice of it, and to permit him to make any equitable or legal defence to which he may be entitled,[5] in which case he should be required to give a stipula-

[1] Fisk *v.* Duncan, 83 Pa. St. 196.

[2] Tryon *v.* Munson, 77 Pa. St. 250. When the real estate bound by a mortgage is situate in two or more counties, it is lawful for the mortgagee or his assignee to issue his writ of *scire facias*, to enforce the collection of said mortgage in the courts of either of the said counties where the mortgage may be recorded, and proceed to obtain judgment thereon; provided, that the sale made under a writ of *levari facias*, issued on the judgment in the county where the judgment shall have been obtained, shall be sufficient to vest in the purchaser the entire estate of the mortgagor in the premises bound by the mortgage, as well in the county where the *scire facias* may have been issued as in the other counties where the mortgage may have been recorded; and provided, further, that before sale be made under the writ of *levari facias*, an exemplification of the record of the judgment shall be taken from the county where the same was obtained, and entered in the courts of the other counties where said mortgage may have been recorded; and advertisement of the sale shall be made by the sheriff, in at least one newspaper published in each of the other counties, in addition to the advertisement as now directed by law in the county in which the sale is to be made. The court of the county in which the judgment may be obtained upon any such mortgage as aforesaid may make any order which may appear to them just and equitable, directing the lands to be sold in parcels, as divided by the county lines or otherwise, as may best suit the interest of parties having liens upon the land in the different counties. Purdon's Ann. Dig. p. 2111, §§ 6, 8.

[3] Hartman *v.* Ogborn, 54 Pa. St. 120; Wilson *v.* McCullough, 19 Pa. St. 77; Brown *v.* Scott, 51 Pa. St. 357.

[4] McLaughlin *v.* Ihmsen, 85 Pa. St. 364; Tryon *v.* Munson, *supra*; Lancaster *v.* Smith, 67 Pa. St. 427; Roberts *v.* Halstead, 9 Pa. St. 32; Frear *v.* Drinker, 8 Pa. St. 520.

[5] Mevey's Appeal, 4 Pa. St. 80; Hinds *v.* Allen, 34 Conn. 185.

tion for costs; otherwise, the judgment being exclusively *in rem*, he is not personally responsible for them. The writ takes the place of a declaration, and should show on its face an immediate cause of action.[1] The judgment cuts off all rights and interests under the mortgage which are not paramount to it, although the parties holding rights subsequent to the mortgage are not made parties to the action, and have no notice of it.[2] The sale under the judgment does not affect prior rights and liens, but is subject to them.[3] The judgment, moreover, extinguishes the debt.[4]

1356. Rhode Island. — There is jurisdiction in equity of the foreclosure of mortgages. The bill should be brought in the supreme court for the county in which the premises are situated. It is heard and determined according to the principles of equity.[5]

The statutory remedies are entry and possession,[6] and actions at law of ejectment, or of trespass and ejectment, for obtaining possession.[7] Redemption may be made within three years after possession is acquired in either way.[8]

1357. South Carolina.[9] — Mortgages are foreclosed by ordinary suit of complaint and summons in the nature of a proceeding in equity. The action must be brought in the county where the premises or some part thereof are situated. If any party interested in the lien or in the property is unknown to the plaintiff, and his residence cannot with reasonable diligence be ascertained by him, the court upon affidavit of such fact may grant an order that the summons be served on such party by publishing the same for six weeks, once in each week successively, in a newspaper printed in the county where the premises are situated. The court has power to adjudge and decree the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which he is personally liable for the debt secured; and if the debt be secured by the covenant or obligation of any other person, the plaintiff may make him a party to the action, and the court may adjudge payment of the residue remaining unsatisfied after a sale

[1] Swift *v.* Allegheny Building Asso. 82 Pa. St. 142.

[2] Dennison *v.* Allen, 4 Ohio, 495.

[3] Wertz's Appeal, 65 Pa. St. 306; Helfrich *v.* Weaver, 61 Pa. St. 385.

[4] Reedy *v.* Burgert, 1 Ohio, 157.

[5] G. S. 1872, ch. 166, § 14; P. S. 1882, ch. 176, § 14.

[6] See § **1245**.

[7] See § **1279**.

[8] G. S. 1872, ch. 165.

[9] R. S. 1873, pp. 597, 610. All distinction between actions at law and in equity is abolished.

against such other person, and may enforce such judgment as in other cases. When judgment has been obtained on the bond, note, or debt secured by the mortgage, in case of any judgment having been obtained subsequent to the property being mortgaged, and prior to the obtaining judgment on the mortgage debt, the court may order the sale of the mortgaged property for the satisfaction of the moneys secured by the mortgage, and may give a reasonable extension of the time when the same is to take place, not exceeding the term of six months from the judgment, and also may give a reasonable credit on the sale, not exceeding the term of twelve months from the sale; and the mortgagor is forever barred and foreclosed by such sale. If, at any time before such sale, the mortgagor tenders or pays to the plaintiff or his attorney, or to the sheriff, all the principal money and interest secured by the mortgage, and also the costs of suit, the sale does not take place, but the mortgagee must enter satisfaction of the mortgage.

The sale must be made in the county where the land lies, by the sheriff of the county who executes a conveyance to the purchaser, which is effectual to pass the rights and interests of the parties adjudged to be sold.[1] There is no redemption.

No mortgagee is entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by mortgage has elapsed; but the mortgagor is still deemed owner of the land, and the mortgagee owner of the money lent or due, and is entitled to recover satisfaction for the same out of the land. On judgment being obtained in the court of common pleas on any bond, note, or debt, secured by mortgage of real estate, it is lawful for the court, in case of any judgment having been obtained subsequent to the property being mortgaged, and prior to the obtaining judgment in the action hereby allowed to be commenced, to order the sale of the mortgaged property for the satisfaction of the moneys secured by the said mortgage, and to give a reasonable extension of the time when the same is to take place, not exceeding the term of six months from the judgment, and also to give a reasonable credit on the sale of the mortgaged premises, not exceeding the term of twelve months from the sale; and the mortgagor is

[1] R. S. 1873, p. 642, § 310. Prior to this provision the sale might also be made by a referee appointed by the court for that purpose. Armstrong *v.* Humphreys, 5 S. C. 128.

forever barred and foreclosed by such sale from his equity of redemption. If, at any time before such sale, the mortgagor shall tender to or pay into the hands of the plaintiff, or his agent or attorney, or to the sheriff, all the principal money and interest meant to be secured by such mortgage, and also all the costs of suit, the sale shall not take place, but the mortgagee shall enter satisfaction on the said mortgage, and the mortgaged premises are forever exempt from the said mortgage. When the same lands are mortgaged at divers times, the debts meant to be secured by such mortgages must be paid in the order the same are recorded.

1358. Tennessee.[1] — Foreclosure is by bill in chancery and sale under decree. The officer whose duty it is to make the sale must, in the absence of any special provision in the decree, publish the sale at least three different times in some newspaper published in the county where it is to be made, the first of which publications shall be at least twenty days previous to the sale. The publication is dispensed with when the owner of the property so directs, or when no newspaper is published in the county, in which cases notice is posted for thirty days in at least five of the most public places in the county, one of which must be the court-house door, and another the most public place in the civil district where the land lies. The advertisement or notice must give the names of the plaintiff and defendant, or parties interested, and describe the land in brief terms, and mention the time and place of sale. A sale without such notice is not on that account void or voidable; but the officer failing to comply with these provisions is guilty of a misdemeanor, and punishable accordingly, and is moreover liable to the party injured for damages. At any time before ten in the forenoon on the day of sale, the owner of the property may deliver to the officer making the sale a plan or division of the lands, subscribed by him and bearing date subsequent to the advertisement, according to which so much of the land as may be necessary to satisfy the debt and costs, and no more, shall be sold. If no such plan is furnished, the land may be sold without division. The sale must be made between the hours of ten in the forenoon and four in the afternoon of the day appointed.[2]

[1] Code 1884, §§ 2969–2979.

[2] Upon any foreclosure of a mortgage or of a deed of trust, the court may order that the property be sold on a credit of not less than six months nor more than two years; that there shall be no right

The real estate sold may be redeemed at any time within two years, unless upon application of the complainant the court order it to be sold on a credit of not less than six months, nor more than two years, and that, upon confirmation by the court, no right of redemption shall exist in the debtor or his creditor, but that the title of the purchaser shall be absolute. This right of redemption does not extend to sales made under a deed of trust or mortgage by virtue of a power.[1] Redemption is made by paying the purchaser the amount paid by him, with interest at the rate of six per cent. per annum, together with all other lawful charges. If the purchaser is a creditor by judgment, decree, or acknowledged by deed, and within twenty days after the sale makes an advance on his bid, and credits his debt, he may hold the property subject to redemption at the price bid and such advance. Any creditor may redeem in the same manner by advancing at least ten per cent. on the sum bid, or crediting that amount on the debt owing to him.[2]

1359. **Texas.** — Foreclosure is by suit in which judgment is rendered and a sale ordered.[3] The ordinary proceeding for foreclosure is by petition in the clerk's office of the district court of the county where such land or a part of it is situated, stating the case and the amount of the demand, and describing the property mortgaged. Whereupon the mortgagor is summoned to appear at the next term of the court, to show cause why judgment should not be rendered for the sum due on the mortgage, with interest and costs. Judgment is rendered and execution issued as in other cases.[4] The judgment against other persons than executors, administrators, or guardians is that the plaintiff recover his debt, damages, and costs, and that an order of sale issue to the sheriff or any constable of the county directing him to sell as under execution, and if the proceeds be insufficient to pay the judgment and costs, further execution may issue for the balance.[5]

of redemption, but the purchaser's title shall be absolute; and that the surplus be paid to the debtor. Compiled Stats. 1871, § 4489.

[1] See Chadbourn *v.* Henderson, 58 Tenn. 460. Before this provision a waiver of redemption was not binding, Cherry *v.* Bowen, 4 Sneed, 415.

[2] Code 1884, §§ 2947–2951.

[3] Power of sale mortgages are in use, but the plaintiff may also foreclose under the statute. The power of sale is only a cumulative remedy. Morrison *v.* Bean, 15 Tex. 267, 269.

[4] Paschal's Dig. 1873, arts. 4675, 4676; R. S. 1879, art. 1198. See, as to jurisdiction, Cavanaugh *v.* Peterson, 47 Tex. 197.

[5] R. S. 1879, art. 1340.

See, as to the decree of sale, Goss *v.* Pilgrim, 28 Tex. 263, 267; Bishop *v.* Jones, 28 Tex. 294, 321. As to form of

When any order foreclosing a lien is made, such order shall have all the force and effect of a writ of possession, as between the parties to such suit of foreclosure and any person claiming under the defendant to such suit by any right acquired pending such suit, and the court shall so direct in the judgment providing for the issuance of such order; and the sheriff or other officer executing such order of sale shall proceed by virtue of said order to place the purchaser of the property sold under the same in possession thereof within thirty days after the day of sale.[1]

Redemption may be had until the sale, but not afterwards.

After the death of the mortgagor proceedings to enforce the mortgage debt must be taken in the probate court.[2] Instead of ordering a sale the court may order payment to be made out of the general assets if this be beneficial to the estate. If one joint mortgagor or owner of the equity be dead, the mortgagee must pursue his remedy against the representatives of the deceased in the probate court, so far as his interest is concerned, and the interest of the other mortgagor, who is living, must be foreclosed in the ordinary way in the district court.[3]

1360. Utah Territory.[4] — There is but one action for the recovery of any debt, or the enforcement of any right secured by mortgage. In such action judgment is rendered for the amount found due the plaintiff, and a decree is entered for the sale of the property and the application of the proceeds to the payment of the expenses of sale, the costs of suit, and the amount due the plaintiff. A judgment is entered for any deficiency there

decree, see Kinney *v.* McCleod, 9 Tex. 78, 80.

[1] Laws 1885, ch. 8.

[2] Any creditor of a deceased person holding a claim secured by mortgage or other lien, which claim has been allowed and approved or established by suit, may obtain, at a regular term of the court from the county court of the county where the letters testamentary or of administration were granted, an order for the sale of the property upon which he has such mortgage or other lien, or so much of said property as may be required to satisfy such claim, by making his application in writing, and having such executor or administrator cited to appear and answer the same. The same notice shall be given of said application as is required to obtain an order for the sale of such property. R. S. 1879, p. 304, § 2067; Paschal's Dig. 1873, arts. 1329, 5705, and 5706; Cannon *v.* McDaniel, 46 Tex. 303. In such case the probate court must order the sale, even if the mortgage contains a power. This is revoked by the mortgagee's death. Fortson *v.* Caldwell, 17 Tex. 627; Boggess *v.* Lilly, 18 Tex. 200; Buchanan *v.* Monroe, 22 Tex. 537, 542; Webb *v.* Mallard, 27 Tex. 80, 83; Giddings *v.* Crosby, 24 Tex. 295, 299. See § 1792.

[3] Martin *v.* Harrison, 2 Tex. 456, 458; Buchanan *v.* Monroe, *supra*; Wiley *v.* Pinson, 23 Tex. 486.

[4] Compiled Laws 1876, pp. 474, 475.

may be against the mortgagor and others liable for the debt. Any surplus proceeds of sale must be paid to the person entitled to it, and in the mean time deposited in court. When the debt is not all due, the sale must cease as soon as sufficient property has been sold to satisfy the amount due; and as often as more becomes due for principal or interest, the court may on motion order a further sale. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, with a proper rebate of interest when necessary.

1361. Vermont.[1] — Foreclosure may be had in equity under general chancery jurisdiction, or a petition in equity for foreclosure may be made with the same effect as by bill.[2]

Whenever a decree shall have been made by the court to foreclose the right in equity of redeeming mortgaged premises, if the premises are not redeemed agreeably to the decree, the clerk of the court of chancery may issue a writ of possession to put the complainant in possession of the premises, which is executed in the same manner, and with the same effect, as similar writs issued by a court of law, after judgment in an action of ejectment.

When the time of redemption has expired, the decree in chancery or a copy of it must be recorded in the town clerk's office where the land is situated, within thirty days after the expiration of the time of redemption. The foreclosure is not effectual against subsequent purchasers, mortgagees, or attaching creditors, unless the decree is so recorded, or afterwards left for record, before they acquire any rights.

Foreclosure may also be made by action of ejectment,[3] in which

[1] R. L. 1880, §§ 760–762, 767–779. This is a strict foreclosure.

[2] Ross *v.* Shurtleff, 55 Vt. 177. The form of the petition and decree are given R. L. 1880, § 760.

On bill or petition to foreclose, any subsequent attaching creditor may be made defendant. St. 1864, No. 29.

A petition for foreclosure does not require the fulness and particularity required by a bill. A general and comprehensive statement of ultimate facts constituting the ground of right and liability is sufficient. Sprague *v.* Rockwell, 51 Vt. 401.

[3] G. S. 1862, ch. 40, §§ 7–11. This mode of foreclosure is applicable only where the conveyance is technically a mortgage by deed, to be void upon condition, or having a defeasance under seal. Miller *v.* Hamblet, 11 Vt. 499. The action may be maintained although the statute of limitations has run against the debt. Reed *v.* Shepley, 6 Vt. 602. The note secured by the mortgage must be produced; and a variance between the note produced and that described in the mortgage cannot be explained by parol as a mistake. Edgell *v.* Stanford, 3 Vt. 202. But it need not be produced when

the court ascertains the sum equitably due to the plaintiff on the mortgage or deed with defeasance, and orders that if the defendant or his representatives shall pay or cause to be paid the amount then due the plaintiff, with legal interest, to the clerk of the court, by a time limited by the court, not exceeding one year from the rendition of the judgment, then such judgment shall be vacated. If the debt is payable by instalments, a part of which is not due at the time the judgment is rendered, the court may order and decree a redemption at any future period, by instalments or otherwise, as to the court shall appear just and equitable, not more than one year after the last instalment shall become due. If the defendant pays within the time limited by the court the sums so ordered to be paid, the clerk delivers to him a certificate of payment, which, when recorded in the proper registry of deeds, defeats the mortgage. If the defendant does not pay as ordered by the time limited, the plaintiff has his writ of possession for the premises recovered, and for his damages and costs, and holds the premises discharged from all right and equity of redemption. When the time of redemption has expired, the plaintiff must record in the town clerk's office where the land is situated, within thirty days after the expiration of the time of redemption, a certified copy of the record of the suit. The foreclosure is not effectual as against subsequent purchasers, mortgagees, or attaching creditors, unless such record is so recorded or afterwards left for record prior to the acquiring of any interest in the lands by subsequent parties.[1]

It is held that if the mortgage embraces several parcels which have subsequently been transferred to different persons, the mortgage must be apportioned upon the land according to their value, and the owner of each given a time to redeem his portion, and upon failure to do so he is foreclosed. If neither of such owners redeem, that is the end of it. If one redeems his portion, and the others do not, then the one redeeming must also redeem the portions of the others, or forfeit the whole estate, and if he does so redeem he takes the whole estate.[2]

1362. Virginia. — Foreclosure is under the general jurisdiction of courts of equity. Mortgages, however, are now seldom or never used in this state, deeds of trust being substituted in their

the mortgagor has released the equity in satisfaction of the note. Marshall *v.* Wood, 5 Vt. 250.

[1] G. S. ch. 29, §§ 78, 79; R. L. 1880, §§ 1253–1257.

[2] Gates *v.* Adams, 24 Vt. 70.

place.[1] There are no provisions of statute relating specifically to the foreclosure of mortgages. There are special provisions relating to deeds of trust,[2] and courts of equity may be invoked in any case to supervise the execution of them.[3] There are general provisions relating to judicial sales which would be applicable to a foreclosure sale under decree of court, and to sales under trust deeds when made under direction of court. These authorize the court to direct the sale to be made for cash, or on such credit and terms as it may deem best; and it may appoint a commissioner to make the sale, who must give bonds before receiving any money under the decree. When no special commissioner is appointed, the sheriff or sergeant may act.[4]

1363. Washington Territory. — When default is made in the performance of any condition contained in a mortgage, the mortgagee or his assigns may proceed, in the district court of the district or county where the land or some part thereof lies, to foreclose the equity of redemption. When there is no express agreement in the mortgage, nor any separate instrument given for the payment of the sum secured thereby, the remedy is confined to the property mortgaged. In rendering judgment of foreclosure the court orders the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and cost of the action. The payment of the mortgage debt, with interest and costs, at any time before sale, satisfies the judgment. When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court directs in the order of the sale that the balance due on the mortgage, with costs remaining unsatisfied after the sale, shall be levied on any property of the mortgage debtor. A copy of the order of sale and judgment is issued and certified by the clerk, under the seal of the court, to the sheriff, who thereupon proceeds to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and costs, as upon execution; and if any part of the judgment, interest, and costs re-

[1] Pitzer *v.* Burns, 7 W. Va. 63, 74.

[2] See chapter XXXIX.

[3] Michie *v.* Jeffries, 21 Gratt. 334.

[4] All sales for the payment of debts contracted or liabilities incurred prior to April 10, 1865, must be upon a credit of not less than three nor more than six equal instalments annually from the day of sale, except that the costs of the suit and sale must be paid in cash. The commissioner cannot sell for less than three fourths of the assessed value. Code 1873, p. 1123. The commissioner or officer is allowed for services 5% on the first $300, and 2% on all above that.

main unsatisfied, the sheriff forthwith proceeds to levy the residue upon the property of the defendant. The sheriff indorses upon the order of sale the time when he received it, and all subsequent proceedings under the order must conform to the provisions regulating sales of property upon execution. A notice must be posted particularly describing the property, for four weeks successively, in three public places of the county where the property is to be sold, and must be published once a week for the same period, in a newspaper of the county, if there be one, or, if there be none, then in a newspaper published nearest to the place of sale. The plaintiff cannot proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor can he prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure.

Whenever a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest or instalment of the principal, and there are other instalments not due, if the defendant pay into court the principal and interest due, with costs, at any time before the final judgment, proceedings thereon shall be stayed, subject to be enforced upon a subsequent default in the payment of any instalment of the principal or interest thereafter becoming due. In the final judgment, the court directs at what time and upon what default any subsequent execution shall issue. In such cases, after final judgment, the court ascertains whether the property can be sold in parcels; and if it can be done without injury to the interests of the parties, the court directs so much only of the premises to be sold as may be sufficient to pay the amount then due on the mortgage, with costs, and the judgment remains and may be enforced upon any subsequent default, unless the amount due shall be paid before execution of the judgment is perfected. If the mortgaged premises cannot be sold in parcels, the court orders the whole to be sold, and the proceeds of the sale applied first to the payment of the principal due, interest, and costs, and then to the residue secured by the mortgage and not due; and if the residue do not bear interest, a deduction is made therefrom by discounting the legal interest; and in all cases when the proceeds of the sale are more than sufficient to pay the amount due and costs, the surplus is paid to the mortgage debtor, his heirs and assigns. In all cases of foreclosure where there is a decree for

the sale of the mortgaged premises or property, and a judgment over for any deficiency remaining unsatisfied, after applying the proceeds of the sale of mortgaged property, further levy and sales upon other property of the judgment debtor may be made under the same order of sale. In such sales it is necessary to advertise notice for two weeks only in a newspaper published in the county, or in the most convenient newspaper having a circulation in such county. An execution may issue as in ordinary cases, either for the whole mortgage debt or such deficiency, after applying the proceeds of the sale of mortgaged property. When, however, an execution shall issue upon a judgment recovered for a debt secured by mortgage, a schedule of the mortgaged property, real or personal, shall be indorsed upon such execution, and the sale thereof under such order shall foreclose the equity of redemption of the mortgage therein. Judgments over for any deficiency remaining unsatisfied, after application of the proceeds of sale of mortgaged property, are similar in all respects to other judgments for the recovery of money, and may be made a lien upon the property of the judgment debtor as other judgments, and the collection thereof enforced in the same manner.[1]

The debtor or his successor in interest may redeem any real estate sold under foreclosure at any time within one year from the date of the sale, by paying the amount of purchase money with interest at the rate of one per centum per month thereon from the date of sale, together with the amount of any taxes which the purchaser may have paid.[2]

1364. West Virginia. — The foreclosure of mortgages in this state, the same as in Virginia, is by bill in chancery, and, as is the case in that state, deeds of trust have been generally substituted for mortgages.[3] There are no statutory provisions in regard to enforcing the latter; though there are such in regard to sales under deeds of trust,[4] which may be made in accordance with the provisions of the deed and the statute without the intervention of the court, or may be supervised by it in equity. All judicial sales may be for cash, or on such credit and terms as the court may deem best; and it may appoint a special commissioner to

[1] Laws 1877, §§ 614–621, 623, 625; § 362, pl. 2.

[2] Laws 1886, p. 116.

[3] Pitzer *v.* Burns, 7 W. Va. 63, 74. Only one case relating to mortgages is found in the reports of this state, and the mortgage in that instance was made in New York.

[4] See chapter XXXIX.

make such sale. If no commissioner is appointed for the purpose, the sheriff or sergeant executes the decree.[1]

1365. Wisconsin.[2] — In actions for the foreclosure of mortgages upon real estate, if the plaintiff recover, the court shall render judgment of foreclosure and sale of the mortgaged premises.

The proceeds of every sale made under such judgment are applied to the discharge of the debt adjudged to be due, and the costs awarded; and if there be any surplus, it is brought into court for the use of the defendant, or of any person who may be entitled thereto, subject to the order of the court. If such surplus, or any part thereof, remain in court for the term of three months without being applied for, the court directs the same to be put out at interest for the benefit of the defendant, his representatives or assigns, to be paid to them by the order of such court.

In all such actions, the plaintiff may, in his complaint, unite with his claim for a foreclosure and sale a demand for judgment for any deficiency which may remain due to the plaintiff, after sale of the mortgaged premises, against every party who may be personally liable for the debt secured by the mortgage, whether the mortgagor or other persons, if upon the same contract which the mortgage is given to secure; and judgment of foreclosure and sale, and also for any such deficiency remaining after applying the proceeds of sale to the amount adjudged to be due for principal, interest, and costs, may in such case be rendered. Such judgment for deficiency is ordered in the original judgment, and separately rendered against the party liable, on or after the coming in and confirmation of the report of sale, and is docketed and enforced as in other cases.[3]

Whenever there is due any interest, or any instalment of the principal, and there be other portions or instalments to become due subsequently, the action is dismissed upon the defendant's bringing into court, at any time before judgment, the principal and interest due, with the costs. If after judgment is entered the defendant bring into court the principal and interest due, with the costs, proceedings on the judgment are stayed; but the court may enforce the judgment by a further order, upon a subsequent de-

[1] Code, p. 734.

[2] R. S. 1878, ch. 135, §§ 3154–3169.

[3] The judgment for a deficiency cannot be rendered with the judgment of foreclosure. Welp *v.* Gunther, 48 Wis. 543.

fault in the payment of any instalment of the principal or of interest. The court, before rendering judgment, directs a reference to some proper person, to ascertain and report the situation of the mortgaged premises, and whether they can be sold in parcels without injury to the interests of the parties; and if it appear that they can be so sold, the judgment directs a sale in parcels, specifying them, or so much thereof as will be sufficient to pay the amount then due; and such judgment remains as security for any subsequent default. If there be any default subsequent to such judgment, the court may, upon petition of the complainant, by a further order, founded upon such first judgment, direct a sale of so much of the mortgaged premises to be made under the said judgment as will be sufficient to satisfy the amount so due, with the costs of such petition and the subsequent proceedings thereon; and the same proceedings are had as often as a default happens.[1] If it appear to the court that the mortgaged premises are so situated that they cannot be sold in parcels without injury to the interests of the parties, or that the sale of the whole will be most beneficial to them, the court may adjudge the sale of the whole accordingly, in which case the proceeds of sale, after deducting the costs of the action and of sale, are applied to the payment of the sums then due and also to become due thereafter; deducting from all sums not due, which do not bear interest, interest from the time of payment to the time when the same are payable; or the court may direct the balance of the proceeds of sale, after paying the sum then due, with such costs, to be placed at interest for the benefit of the plaintiff, to be paid to him as such subsequent instalments become due, with the interest thereon.

The judgment fixes the amount of the mortgage debt then due, and also the amount of each instalment thereafter to grow due, and the several times when they will become so due, and adjudges that the mortgaged premises be sold for the payment of the amount adjudged to be then due, and of all instalments which shall thereafter grow due before the sale, or so much thereof as may be sufficient to pay such amount, including costs of sale; but no such sale shall be made until the expiration of one year from the date of such judgment or order of sale; and when judgment is for instalments due and to grow due, and payment shall be made within the year of the instalments found due at the date of the judgment, with interest and costs, no sale shall be made

[1] Supp. to R. S. 1883, § 3159, p. 682.

upon any instalment growing due after the date of the judgment, until the expiration of one year after the same shall become due;[1] but in all cases the parties may, by stipulation in writing, to be filed with the clerk, consent to an earlier sale. These provisions do not apply to judgments of foreclosure and sale of mortgages given by any railroad corporation; but such sales may be made immediately after the rendition of the judgment.

If any defendant appear and answer that any portion of the mortgaged premises is a homestead, the court ascertains whether such be the fact, and if so, whether the part of the mortgaged premises not included in the homestead can be sold separately therefrom without injury to the interests of the parties, and in that case directs that the homestead shall not be sold until all the other mortgaged lands have been sold.

The amount adjudged to be due in the judgment draws interest at the rate of ten per cent. per annum, from its date until the date of sale or payment, and all instalments which become due after the date of such judgment draw interest at the same rate from the time the same become due. The court may also, in the judgment, enjoin the defendants and all persons claiming under them from committing any waste, or doing any act that may impair the value of such premises at any time after the date of the judgment.

The mortgagor, his heirs, personal representatives, or assigns, may redeem the mortgaged premises from the effect of said judgment, and the lien of the mortgage thereon, at any time before the sale of such premises, by paying to the clerk of the court, or to the plaintiff therein, or any assignee thereof, or to his attorney, the amount of such judgment, interest thereon as aforesaid, and costs, and any costs subsequent to such judgment, and any sums paid by the plaintiff subsequent to the judgment, for or in redemption of taxes assessed upon the mortgaged premises, with interest thereon from the date of payment at the same rate. On payment to such clerk as aforesaid, or on filing the receipt of the plaintiff, or his assigns or attorney, for such payment, in the office of said clerk, he thereupon discharges such judgment, and a certificate of such discharge, duly recorded in the office of the regis-

[1] The judgment referred to is the formal entry by the clerk of the court, completed so as to show the total amount which must be paid in order to redeem, including the costs taxed. Andrews *v.* Welch, 47 Wis. 132.

ter of deeds, discharges such mortgage of record, to the extent of the sum so paid.

In case the mortgagor, his heirs, representatives, or assigns, desire to pay a portion of such judgment, taxes, interest, and costs, so as to relieve any distinct lot or parcel of the premises which can be sold separately under such judgment from the lien thereof, and of such mortgage thereon, the court, on application of such person, and on notice to the parties to the action, may, if the amount to be paid therefor is not agreed upon, ascertain and adjudge the proportion of such judgment, taxes, interest, and costs to be paid for the purpose aforesaid; and when the amount so adjudged shall be paid, it relieves such distinct lot or parcel from such judgment and lien. Any heir, devisee, grantee, or assignee of the mortgagor, owning an undivided interest in the mortgaged premises, subject to the lien of the mortgage, may redeem such undivided interest by paying a sum that will bear the same proportion to the whole of such judgment, taxes, costs, and interest as the interest proposed to be redeemed bears to the whole of the mortgaged premises.

Any person having a lien, acquired at any time before the sale, upon the mortgaged premises, or any part thereof, or interest therein, subsequent to the lien of any such mortgage, may also at any time before such sale pay, as above provided, the amount of such judgment, taxes, interest thereon as aforesaid, costs, and any costs subsequent to such judgment, and thereupon be subrogated to all the rights of the plaintiff as to such judgment, with full power to enforce the same, unless the same shall have been paid by the mortgagor, or person personally liable for the mortgage debt.[1]

The sheriff or referee who makes sale of mortgaged premises under a judgment therefor shall give notice of the time and place of sale, in the manner provided by law for the sale of real estate upon execution, or in such other manner as the court shall in the judgment direct.[2] He shall, within ten days thereafter, file with the clerk of the court a report of the sale, and immediately after the sale shall pay to the parties entitled thereto, or their attor-

[1] The mortgagor has the paramount and absolute right to redeem; and upon his doing so a deposit previously made by the holder of a subsequent lien, for the purpose of redeeming, becomes of no effect. Wylie *v.* Welch, 51 Wis. 351.

[2] The notice of sale must be published for six full weeks after the expiration of one year from the date of the judgment. Kopmeier *v.* O'Neil, 47 Wis. 593; Northwestern Mut. Life Ins. Co. *v.* Neeves, 46 Wis. 147.

neys, the proceeds of the sale, after deducting the cost thereof, unless otherwise ordered by court.

Upon any such sale being made, the sheriff or referee making the same, on compliance with its terms, shall make, execute, and deliver to the purchaser a deed of the premises sold, setting forth each parcel of land sold to him, and the sum paid therefor, which deed, upon the confirmation of such sale, vests in the purchaser all the right, title, and interest of the mortgagor, his heirs, personal representatives, and assigns, in and to the premises sold, and is a bar to all claim, right, or equity of redemption therein, of and against the parties to such action, their heirs and personal representatives, and also against all persons claiming under them subsequent to the filing of the notice of the pendency of the action in which such judgment was rendered; and the purchaser is let into the possession of the premises so sold, on production of such deed, or a duly certified copy, and the court may, if necessary, issue a writ of assistance to deliver such possession.[1]

The register of deeds shall, upon the filing of any *lis pendens* for the foreclosure of a mortgage, enter upon the margin of the record of such mortgage a memorandum of the filing of such notice and the date thereof.[2]

1366. Wyoming Territory.[3] — Mortgages are foreclosed in equity. In actions to enforce mortgages, a personal judgment is rendered for the amount due with interest, and for the sale of the property and the application of the proceeds, or such application may be reserved for further order of the court. When the mortgage embraces separate tracts of land situated in two or more counties, the sheriff of each county must make sale of the lands situated in the county of which he is sheriff.

[1] This provision defines the rights of the purchaser after confirmation of sale. Welp *v.* Gunther, 8 Wis. 543. Wœhler *v.* Endter, 46 Wis. 301.

[2] R. S. 1878, ch. 37, § 76.

[3] Compiled Laws 1876, ch. 13, § 381, of the Civil Code.

CHAPTER XXXI.

THE PARTIES TO AN EQUITABLE SUIT FOR FORECLOSURE.

PART I.
Of Parties Plaintiff, 1368–1393.

PART II.
Of Parties Defendant, 1394–1442.

1367. General principles. — In determining who are the proper and necessary parties to a bill to foreclose a mortgage, two fundamental principles in all proceedings in equity must be kept in view: first, that no one shall be adjudged as to his rights except he is before the court; and second, that the rights of all persons interested in the object of the suit shall be provided for in the determination of it. It is the constant aim of a court of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation.[1] It is a maxim, as stated by Lord Talbot, that "a court of equity in all cases delights to do complete justice, and not by halves."[2] Therefore it is generally essential that all persons materially interested in the subject matter of the suit shall be made parties to it either as plaintiffs or defendants.[3] This is, however, a general statement, and as a practical rule is subject to many limitations. Those who are indirectly or consequently interested in the mortgage debt or in the mortgaged premises are not necessarily included among the proper parties to the suit. The interest in the object of the suit must be apparent upon the record. When it is said that a person *materially* interested should be made a party to the suit, the materiality of the interest is relative to the case, and to the prayer of the bill. For instance, a mortgagee may pray for a foreclosure against the mortgagor and not against a subsequent incumbrancer, in which case such incumbrancer is not

[1] Lord Redesdale's Pleadings, 164.

[2] Knight *v.* Knight, 3 P. W. 331, 333.

[3] Per Lord Eldon, in Cockburn *v.* Thompson, 16 Ves. 321, 325; per Sir Wm. Grant, in Wilkins *v.* Fry, 1 Mer. 244, 262; per Lord Redesdale, Pl. 164; per Lord Langdale, in Richardson *v.* Hastings, 7 Beav. 323, 326.

materially interested in the object of the suit. Then, as we shall presently notice more fully, the interests which persons have in the debt and in the equity of redemption may be represented by others, as by executors and administrators, and by trustees. Moreover, the suit may be brought or defended by persons interested on behalf of themselves and of others; as where the number is too large to make it practicable to bring all of them before the court. In several other ways the general rule founded upon interest is modified in the practical application of it; and these exceptions will appear under the particular applications of the rule to the parties interested in the mortgage debt and property to be made in this chapter.

Of course, when neither party to a mortgage has assigned his interest, or done anything to affect it in any way down to the time of the bringing of the suit to foreclose it, the mortgagor and mortgagee remain the only parties to be brought before the court. But this simple state of facts may be changed to one of great complication by events subsequent to the mortgage; and the changes which thus take place give rise to a great many questions as to the proper and necessary parties to a suit for foreclosure.

These general principles of equity respecting the parties to suits have been embodied in the codes adopted in several of the states, and extended to all actions, whether such as were formerly suits in equity or distinctively suits at law. These codes provide that all persons having an interest in the subject of the action, or in obtaining the relief demanded, may be joined as plaintiffs.[1] "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."[2]

[1] Pomeroy's Remedies, § 116.

For a statement of the provisions in several states abolishing all distinction between suits at law and in equity, see chapter xxx.; and also see Pomeroy's Remedies, §§ 28–30, 44.

[2] **New York**: 4 R. S. 7th ed., § 448 Code of Civ. Proced.

Ohio: R. S. 1880, §§ 5007, 5008.

Indiana: R. S. 1888, § 269.

Iowa: R. Code 1880, §§ 2548, 2549.

Wisconsin: R. S. 1878, § 2604.

Kansas: §§ 37, 38.

Nebraska: Comp. Stats. 1885, p. 633, §§ 42, 43.

In the same states it is provided that an executor, administrator, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted.[1] It is further provided that when a complete determination of the controversy between the parties before the court cannot be had without the presence of other parties, the court must cause them to be brought in. A person having an interest in the subject of the suit, and not a party to it, may be made a party on his own application.[2] These codes also contain a few other provisions relative to parties, generally recognizing equitable rules already established, but which it is not essential to notice in this connection.

PART I.

OF PARTIES PLAINTIFF.

Who are the Proper Parties.

1368. All those who are interested in the mortgage debt should, according to the general principle already stated, join in the suit to enforce the security. If the mortgagee is the only party in interest, he is of course the only plaintiff. If several persons and even numerous persons are made mortgagees, or are entitled to the mortgage money, all of them must be parties to the suit,[3] though there are many cases in which some of the persons so interested may properly be made defendants. The codes of several states, as already noticed, embody this equitable principle, extending it to all actions, including such as were formerly distinctively actions at law. Not only joint mortgagees, but also persons having an united interest in the debt secured, even if their interests be several, may join as plaintiffs.[4]

Missouri: Art. 1, § 6, without the last clause.

Nevada: G. S. 1885, § 3036.

Oregon: 1 Annot. Laws, 1887, § 385, but limited to equitable actions.

California: Codes and Stats. 1885, § 382 of Code of Civ. Proced.

Kentucky: Civil Code 1876, §§ 24, 25.

North Carolina: Code 1883, § 185.

South Carolina: R. S. p. 596, § 142.

[1] Pomeroy's Remedies, § 115.

[2] Ibid. § 119.

[3] Palmer *v.* Carlisle, 1 S. & S. 423, 425. Sir John Leach said: "There can be no foreclosure or redemption, unless the parties entitled to the whole mortgage money are before the court." Carpenter *v.* O'Dougherty, 2 T. & C. (N. Y.) 427; *S. C.* 67 Barb. 397; affirmed, 58 N. Y. 681; Pine *v.* Shannon, 30 N. J. Eq. 501.

[4] Story's Eq. Pl. § 201; Pomeroy's Remedies, §§ 116, 117, 183; Lowe *v.*

1369. Joinder of plaintiff. — It is not very material, however, in an equity suit, whether more than one of the persons interested in prosecuting it is nominally made a plaintiff. It is generally sufficient that the persons to be bound by the decree shall be brought before the court in some capacity.[1] When a person having an interest in the security is made a defendant in the action, the bill ought to show his refusal to join as a plaintiff; but this omission is not material unless such defendant objects by demurrer.[2] If several persons have rights and interests in the same demand and security, even if these are not strictly joint, and are entitled to the same relief, they should naturally join as plaintiffs in seeking it. But if one of the persons so interested institutes the suit, and makes the others having like interests defendants, the requirements of equity are generally satisfied. If several persons have claims alike in being antagonistic to the defendant, but several and distinct in their nature, because they have arisen out of different events and circumstances, although they may join as co-plaintiffs in seeking the same relief, in actual practice one person, perhaps by reason of his greater interest or more urgent occasion for relief, institutes the suit without asking the coöperation of the others, making them defendants. And finally, as no one can be made a plaintiff against his will, this practical restriction in many cases determines the question whether a person shall be made a plaintiff or defendant.

There are, however, some decisions at variance with these generally established doctrines in equity. Thus, it was held in one case that where a mortgage was given to secure two or more notes which were transferred to different persons, the holders could not join in an action to foreclose it, although a *pro rata* interest in the security was assigned, because, the indebtedness having been severed, the demands were distinct and separate. The rights of all parties were, however, protected and determined in one action in which the holder of one note was made plaintiff, and the hold-

Morgan, 1 Bro. C. C. 368; Stansfield *v.* Hobson, 16 Beav. 189; Palmer *v.* Carlisle, 1 S. & S. 423, 425; Noyes *v.* Sawyer, 3 Vt. 160; Pogue *v.* Clark, 25 Ill. 351; Shirkey *v.* Hanna, 3 Blackf. (Ind.) 403; Stucker *v.* Stucker, 3 J. J. Marsh. (Ky.) 301; Woodward *v.* Wood, 19 Ala. 213.

[1] Wilkins *v.* Fry, 1 Mer. 244, 262, per Sir William Grant: "In equity it is sufficient that all parties interested in the subject of the suit should be before the court, either in the shape of plaintiffs or defendants."

[2] Hancock *v.* Hancock, 22 N. Y. 568; Carpenter *v.* O'Dougherty, 58 N. Y. 681.

ers of the others defendants, who answered in the form of cross-bills, and had their rights fixed by the decree.[1]

It is not material that the interests of the several plaintiffs should be coextensive, or that they should have originated at the same time. Neither is the extent of the interest material, if there be any interest at all; nor whether it be absolute or conditional.[2]

1370. Real party in interest. — Moreover the codes of all these states provide that "every action must be prosecuted in the name of the real party in interest,"[3] thus recognizing another established principle of equity and extending it to all actions. The application of this rule to the question, Who can prosecute a suit to foreclose a mortgage? is of special service in answering it in the case of an assignment of the mortgage, whether this be a legal or equitable assignment. If the assignee be the legal owner of both the mortgage and the mortgage debt, he must of course bring the action. If he is the equitable assignee only, he is still the proper plaintiff; and generally the only plaintiff necessary, though by statute in a few of the states the assignor retaining the legal title should be joined either as plaintiff or defendant.

A note and mortgage given to secure an indebtedness to a county, made in terms to the supervisors of such county or their successors in office, may be declared upon as obligations to the county, and the suit may be brought in the name of the board of supervisors.[4]

A subsequent judgment creditor of the mortgagor having a lien upon the equity of redemption may redeem the mortgage and then foreclose it; but without having redeemed he cannot maintain a bill in equity to have the mortgage foreclosed, and the proceeds of sale applied, after payment of the mortgage debt, to the satisfaction of his judgment.[5]

1371. Plaintiff must have some interest. — After an absolute assignment the suit cannot be prosecuted in the mortgagee's name for the use of the assignee.[6] The plaintiff must have either the legal or equitable interest. If he has not both these interests,

[1] Rankin *v.* Major, 9 Iowa, 297. To like effect see Thayer *v.* Campbell, 9 Mo. 280. But the court say that the proceeding to foreclose is one at law, and is not governed by the rules in equity.

[2] Pomeroy's Remedies. § 199.

[3] Ibid. § 124.

[4] Oconto County *v.* Hall, 42 Wis. 59.

[5] Kelly *v.* Longshore, 78 Ala. 203.

[6] Barraque *v.* Manuel, 7 Ark. 516.

he must make the holder of the other interest a party with himself; if not plaintiff, then as defendant. The plaintiff must, however, have some interest either as mortgagee or assignee.[1] If he has only a partial interest, the remedy given is limited to the extent of that interest. Therefore, where the holder of two mortgage notes assigned one of them, and afterwards brought suit to foreclose the other, he was not allowed to take judgment for the amount of the assigned note as well as for that of the note retained by him, although he was liable upon the other note as indorser.[2]

A purchaser at a foreclosure sale who has subsequently discovered that there was a junior mortgage upon the property, the holder of which was not made a party to the foreclosure suit, may then take an assignment of the foreclosed bond and mortgage and maintain a second foreclosure suit to cut off such junior mortgagee.[3]

1372. It is apparent, therefore, that a formal legal assignment is not requisite in equity to enable the assignee to enforce the mortgage in his own name. If he is the real party in interest, the form by which he acquires this interest is quite immaterial. A verbal assignment, even, of the bond and mortgage, gives the assignee an equitable claim to them, and enables him to bring an action upon them in his own name.[4]

1373. If the mortgage has been in legal form assigned absolutely and the mortgagee retains no further interest in it, he is not a proper party to the suit.[5] "It is enough to make that man a party who has contracted to stand in the place of the original mortgagee and of all assignees."[6]

1374. A mortgagee who has assigned his mortgage as collateral security for his own debt, but still has a pledgor's interest in the mortgage, should be made a party to a suit by the assignee to foreclose it, although the assignment be in terms absolute, and re-

[1] Bolles *v.* Carli, 12 Minn. 113.

[2] Haynes *v.* Seachrest, 13 Iowa, 455.

[3] Franklyn *v.* Hayward, 61 How. (N. Y.) Pr. 43.

[4] Green *v.* Marble, 37 Iowa, 95; Andrews *v.* McDaniel, 68 N. C. 385. This last was an unindorsed note.

[5] Walker *v.* Smalwood, 2 Amb. 676; Gaskell *v.* Durdin, 2 Ball & B. 167; Miller *v.* Henderson, 10 N. J. Eq. (2 Stockt.) 320; Parker *v.* Stevens, 3 N. J. Eq. (2 Green) 56; McGuffey *v.* Finley, 20 Ohio, 474; Christie *v.* Herrick, 1 Barb. (N. Y.) Ch. 254; Whitney *v.* M'Kinney, 7 Johns. (N. Y.) Ch. 144; Garrett *v.* Puckett, 15 Ind. 485; Walker *v.* Bank of Mobile, 6 Ala. 452; Newman *v.* Chapman, 2 Rand. (Va.) 93; Prout *v.* Hoge, 57 Ala. 28.

[6] Chambers *v.* Goldwin, 9 Ves. 254, 264.

cites the payment of a full consideration for it;[1] otherwise the effect of the foreclosure as between the pledgor and pledgee is simply to substitute the land for the mortgage, and the pledgee will hold it subject to redemption by the pledgor, although the foreclosure may be effectual to cut off the equity of redemption of the mortgagor and all persons claiming under him except the mortgagee.[2] If, however, it appears from the assignment that it was the intention of the assignor to give the assignee the right to foreclose, or to receive the moneys in his own name, it is unnecessary to make the assignor a party, although he retains an interest in the mortgage. It was so held where the assignment was absolute in form, except that it stated that the money, when collected, was to be applied in liquidation of the debts for which the complainant stood security for the assignor.[3] It is proper, however, to join both the assignor and assignee as plaintiffs in the action.

1375. One who holds the mortgage as a collateral security for a smaller debt due him from the assignor must make the latter a party to the suit to enforce it, inasmuch as he is interested to the amount of the surplus above his debt.[5] This is in accordance with the general rule that all who are interested in the mortgage debt must be made parties to the foreclosure suit. And if in any way the assignment of the mortgage be not absolute, and the mortgagee retains an interest in the security, he is a necessary party.[6] Even if the assignment is absolute in its terms and expresses the payment of a full consideration, the mortgagee should still be made a party if the assignee is accountable to him for any part of the proceeds of it.[7] The fact that he is liable to account does not, however, impair the right of the assignee to enforce collection of the mortgage.[8] This only affects the amount for which he may have a decree. He is the proper party to institute the proceedings, having the legal and apparent title.[9] If in such case the assignee refuses to foreclose, and the collateral character of

[1] Hobart *v.* Abbot, 2 P. Wms. 643; Gage *v.* Stafford, 1 Ves. Sen. 544; Johnson *v.* Hart, 3 Johns. (N. Y.) Ch. 322; Whitney *v.* M'Kinney, 7 Johns. (N. Y.) Ch. 144; Kittle *v.* Van Dyck, 1 Sandf. (N. Y.) Ch. 76; Cerf *v.* Ashley, 68 Cal. 419.

[2] Matter of Gilbert, 104 N. Y. 200.

[3] Christie *v.* Herrick, 1 Barb. (N. Y.) Ch. 254.

[4] Hoyt *v.* Martense, 16 N. Y. 231.

[5] Woodruff *v.* Depue, 13 N. J. Eq. 168, 176.

[6] Miller *v.* Henderson, 10 N. J. Eq. (2 Stockt.) 320.

[7] Kittle *v.* Van Dyck, *supra.*

[8] Overall *v.* Ellis, 32 Mo. 322.

[9] McKinney *v.* Miller, 19 Mich. 142; Norton *v.* Warner, 3 Edw. (N. Y.) Ch. 106.

the assignment appears on the face of it, the assignor may foreclose in his own name;[1] and it would seem that his interest might be established by evidence aside from anything upon the face of the assignment, so that he might enforce the mortgage upon the neglect or refusal of the assignee to do so, on the same principle by which it is held that a verbal assignment of a bond and mortgage entitles the assignee to sue in his own name.[2] In such case the assignee may be made a party defendant, and neither the mortgagor nor any person other than the assignee himself can object.[3]

But if on the face of the pleadings no necessity appears for making the assignor a party, and it does not appear that he has any interest, an objection raised at the hearing, that he is not a party, will not prevail.[4]

1375 *a*. If a mortgage has been assigned, the assignee should maintain the suit to foreclose the mortgage; and even if the assignment is made pending a foreclosure suit by the mortgagee, the assignee may generally be substituted as plaintiff. If a counter-claim has been filed against the mortgagee, this may be applied as against such assignee.[5]

If a mortgage of indemnity has been assigned after the mortgagee's claim under the mortgage has become fixed, the assignee should maintain the suit to foreclose the mortgage.[6]

The plaintiff in a process of garnishment against a mortgagor and his mortgagee, after obtaining judgment, is in legal effect an assignee of the mortgage and mortgage debt, and may maintain an action to foreclose the mortgage.[7]

1376. The assignee of a mortgage, without the bond or note secured by it, has no interest in it as against a subsequent assignee of both and cannot foreclose it.[8] The debt is the principal thing, and the mortgage only the incident. The assignment of the mortgage by delivery merely does not carry with it the bond or note, and is not conclusive evidence of an inten-

[1] Simson *v.* Satterlee, 6 Hun (N. Y.), 305; Norton *v.* Warner, 3 Edw. (N. Y.) Ch. 106; Sinking Fund Commissioners *v.* Northern Bank of Kentucky, 1 Metc. (Ky.) 174.

[2] See § 1377.

[3] Simson *v.* Satterlee, *supra.*

[4] Stevens *v.* Reeves, 33 N. J. Eq. 427; Woodruff *v.* Depue, 14 N. J. Eq. 168.

[5] Schlichter *v.* Brooklyn Sawmill Co. 35 Hun (N. Y.), 339.

[6] Bendey *v.* Townsend, 109 U. S. 665.

[7] Alsdorf *v.* Reed (Ohio), 17 N. E. Rep. 73.

[8] Cooper *v.* Newland, 17 Abb. (N. Y.) Pr. 342; Merritt *v.* Bartholick, 47 Barb. (N. Y.) 253.

tion to pass it; although generally the mortgage passes by a transfer of the bond or note so as to make an equitable transfer of the mortgage.

1377. Assignee of mortgage note. — In most of the states the doctrine prevails that the mortgage debt is the essential fact, and the mortgage itself a mere incident of it; and as a consequence, that a transfer of the note or other evidence of the debt carries with it the security without a special assignment of it. In those states, therefore, a suit to foreclose the mortgage may be brought by the assignee without making the mortgagee who assigned it a party.[1] Under statutes which require suits to be brought in the name of the real party in interest, a foreclosure suit should be brought in the name of the equitable owner of the note secured, although he be not the payee or indorsee.[2] The holder of the mortgage without the debt has no interest in it. The equitable assignee may, however, join the assignor with him in the suit,[3] or make him a defendant.[4] Even where the assignment of the note is not a legal assignment of the mortgage, the assignee of the note acquires an equitable interest which a court of equity will protect, though all parties, including the mortgagee, whether having equitable or legal interests, must be parties to the suit.[5] Under the practice in some states, the assignee of the note in such case may sue in the name of the mortgagee, even against his consent, on giving him proper indemnity against costs.[6] If the mortgage debt be assigned by parol merely, the legal title remaining in the mortgagee, he is a necessary party to a bill filed by such equitable assignee.[7]

1377 *a*. The assignee in bankruptcy of the holder of a mortgage should enforce the mortgage, if it is for the benefit of the bankrupt's estate that he should do so. But if he abandons the right, or declines to prosecute a suit already pending in favor of the bankrupt, as he may properly do when, for instance, the mortgage note has been pledged by the bankrupt and he does not

[1] Swett *v.* Stark, 31 Fed. Rep. 858; Gower *v.* Howe, 20 Ind. 396; Garrett *v.* Puckett, 15 Ind. 485; Austin *v.* Burbank, 2 Day (Conn.), 476; Briggs *v.* Hannowald, 35 Mich. 474.

[2] Irish *v.* Sharp, 89 Ill. 261.

[3] Holdrige *v.* Sweet, 23 Ind. 118.

[4] Burton *v.* Baxter, 7 Blackf. (Ind.) 297; Stone *v.* Locke, 46 Me. 445.

[5] Moore *v.* Ware, 38 Me. 496; Stone *v.* Locke, *supra;* Bibb *v.* Hawley, 59 Ala. 403; Prout *v.* Hoge, 57 Ala. 28; Hopson *v.* Ætna Axle & Spring Co. 50 Conn. 597.

[6] Calhoun *v.* Tullass, 35 Ga. 119; English *v.* Register, 7 Ga. 387.

[7] Denby *v.* Mellgrew, 58 Ala. 147.

consider it worth while to redeem from the pledge, the bankrupt may maintain the suit. The right of property in such case remains in, or is restored to, the bankrupt, for he has the right as against every one but the assignee.[1]

A receiver of the property of a corporation, partnership, or individual, appointed by order of court with power to collect debts and for that purpose to institute suits, in foreclosing a mortgage should join with him as complainant the mortgagee in whom the legal title is vested;[2] unless the appointment be made under a statute which vests the title to the property in the receiver.[3]

1378. The holder of one of several notes secured by the same mortgage may proceed in the first instance to foreclose by suit in equity without suing at law; but all the other mortgagees or holders of notes secured by it must be brought before the court as defendants before a decree is made.[4] There are as many causes of action as there are separate notes in the hands of different persons. Two holders of notes cannot join as plaintiffs to enforce the mortgage. There is no community of interest between such holders, but rather an antagonism. Only one such holder can be plaintiff, and he must make the other holders defendants, so that the amounts and priorities of their several liens may be determined.[5] The plaintiff's allegation, that another note secured by the mortgage may be presumed from lapse of time and other circumstances to have been paid, is insufficient to excuse his not making the assignee of it a party to the suit.[6]

1379. A partner who holds a mortgage as security for a debt due the partnership should join the other partners with him as plaintiffs in an action to foreclose it.[7]

Where a mortgage is made to a partnership in the firm name, the mortgagees are sufficiently identified by making the individ-

[1] Towle *v.* Rowe, 58 N. H. 394.

[2] Comer *v.* Bray (Ala.), 3 So. Rep. 554; Harland *v.* Bankers' & Merchants' Tel. Co. 32 Fed. Rep. 305.

[3] Miller *v.* Mackenzie, 29 N. J. Eq. 291.

[4] Goodall *v.* Mopley, 45 Ind. 355; Stanley *v.* Beatty, 4 Ind. 134; Merritt *v.* Wells, 18 Ind. 171; Rankin *v.* Major, 9 Iowa, 297; Myers *v.* Wright, 33 Ill. 284; Pogue *v.* Clark, 25 Ill. 351; Wilson *v.* Hayward, 2 Fla. 27; Wiley *v.* Pinson, 23 Tex. 486; Hartwell *v.* Blocker, 6 Ala. 581; Johnson *v.* Brown, 31 N. H. (11 Fost.) 405; Pettibone *v.* Edwards, 15 Wis. 95; Jenkins *v.* Smith, 4 Metc. (Ky.) 380; Utz *v.* Utz, 34 La. Ann. 752.

[5] Swenson *v.* Moline Plough Co. 14 Kans. 387.

[6] Bell *v.* Shrock, 2 B. Mon. (Ky.) 29.

[7] Noyes *v.* Sawyer, 3 Vt. 160; De Greiff *v.* Wilson, 30 N. J. Eq. 435, citing text with approval. But in Michigan it is held that it is immaterial whether a partner who holds a mortgage as trustee for the partnership joins his partners or not. Shelden *v.* Bennett, 44 Mich. 634.

ual partners plaintiffs in the proceedings, and alleging that they constitute the firm named.[1]

1380. A surety of a debt secured by mortgage on lands of the principal on paying the debt is subrogated in equity to the rights of the mortgagee, and may foreclose in his own name without an assignment of the mortgage and bond.[2] In like manner a purchaser who has assumed the payment of a mortgage on land which he has subsequently sold to another, who in turn has assumed the mortgage but has failed to pay it, may upon being obliged to pay it foreclose it in his own name without having an assignment of it.[3] And a person interested in the land subject to the mortgage, though not personally bound to pay it, upon doing so for his own protection has the same right.[4] It is even held that without paying the debt a surety may file a bill to foreclose the mortgage, making the mortgagee a party, and asking for judgment against the persons primarily liable.[5]

1381. Joint mortgagees. — Where one of two joint mortgagees has become the owner of the equity of redemption, the other can maintain against him a bill for foreclosure to the extent of his interest.[6] In like manner a note and mortgage given by thirteen persons to three of their number may be foreclosed for ten thirteenths of the debt, by a suit in which the three join as plaintiffs against the others as defendants.[7] A mortgagee of an undivided interest may foreclose that interest, although he is the owner of the other undivided part of the land,[8] or although a suit for partition is pending.[9] A mortgagee is not prevented from foreclosing by reason of being one of the trustees who hold the equity of redemption; he may bring the action against his co-trustees,[10] or one of several executors holding the estate; he may as mortgagee foreclose his mortgage upon it against his co-executors.[11]

[1] Bernstein *v.* Hobelman (Md.), 16 Atl. Rep. 374.

[2] Ellsworth *v.* Lockwood, 42 N. Y. 89; Halsey *v.* Reed, 9 Paige (N. Y.), 446.

[3] **New York**: McLean *v.* Towle, 3 Sandf. Ch. 117; Tice *v.* Annin, 2 Johns. Ch. 125; Cherry *v.* Monro, 2 Barb. Ch. 618; Ferris *v.* Crawford, 2 Den. 595; Johnson *v.* Zink, 52 Barb. 396; Brewer *v.* Staples, 3 Sandf. Ch. 579. **California**: Waldrip *v.* Black, 16 Pac. Rep. 226.

[4] Ellsworth *v.* Lockwood, 42 N. Y. 89; Averill *v.* Taylor, 8 N. Y. 44.

[5] Marsh *v.* Pike, 1 Sandf. (N. Y.) Ch. 210; *S. C.* 10 Paige, 595; M'Lean *v.* Lafayette Bank, 3 McLean, 587.

[6] Sanford *v.* Bulkley, 30 Conn. 344.

[7] McDowell *v.* Jacobs, 10 Cal. 387.

[8] Baker *v.* Shephard, 30 Ga. 706.

[9] Gleises *v.* Maignan, 3 La. 530.

[10] Paton *v.* Murray, 6 Paige (N. Y.), 474.

[11] McGregor *v.* McGregor, 35 N. Y. 218; Lawrence *v.* Lawrence, 3 Barb. (N. Y.) Ch. 71.

1382. When a mortgage secures an indebtedness due to the mortgagees jointly, their interest in the estate so far partakes of the nature of the debt that the doctrine of survivorship applies, and the suit to foreclose may be brought in the name of the survivor, without making the heir or personal representatives of the deceased mortgagee a party.[1] If there are conflicting claims as to the mortgage money, the executor of the deceased mortgagor should be made a defendant.[2] The survivor of joint assignees of a mortgage of course has the same right to foreclose, without joining the personal representatives of the deceased assignee, that the survivor of joint mortgagees has.[3]

If the money equitably belongs to the mortgagees severally, the representatives of one of the deceased mortgagees should be joined with the survivor.[4]

If the mortgagees have no joint or common interest in the debt secured by the mortgage, this fact should be alleged in the bill, and the decree be for the payment of the sums due to each severally.[5]

1383. It is a general rule that a nominal trustee cannot bring the suit in his own name alone, but must join with him the names of those persons who have the beneficial interest.[6] The trustee in a deed of trust is a necessary party,[7] and he should join with himself the holder of the debt secured.[8] But where, on account of the number of the persons interested, great inconvenience and expense would be incurred in joining them in the bill, the court will in its discretion dispense with a strict adherence to this rule.[9] Accordingly where a mortgage was made to a banker as "the agent and trustee of the several subscribers to the loan," which was of large amount, it was held that the mortgagee might file the bill in his own name alone.[10] And where a bill is

[1] Williams *v.* Hilton, 35 Me. 547; Blake *v.* Sanborn, 8 Gray (Mass.), 154; Martin *v.* McReynolds, 6 Mich. 70; Lannay *v.* Wilson, 30 Md. 536; Milroy *v.* Stockwell, 1 Ind. 35; Erwin *v.* Ferguson, 5 Ala. 158; McAllister *v.* Plant, 54 Miss. 106.

[2] Freeman *v.* Scofield, 16 N. J. Eq. 28.

[3] Martin *v.* McReynolds, *supra.*

[4] Vickers *v.* Cowell, 1 Beav. 529.

[5] Higgs *v.* Hanson, 13 Nev. 356; Ætna L. Ins. Co. *v.* Finch, 84 Ind. 301.

[6] Davis *v.* Hemingway, 29 Vt. 438; Stillwell *v.* M'Neely, 2 N. J. Eq. (1 Green) 305; Freeman *v.* Scofield, 16 N. J. Eq. 28; Woodruff *v.* Depue, 14 N. J. Eq. 168, 176; Large *v.* Van Doren, 14 N. J. Eq. 208; Jewell *v.* West Orange, 36 N. J. Eq. 403.

[7] Harlow *v.* Mister, 64 Miss. 25.

[8] Boyd *v.* Jones, 44 Ark. 314.

[9] Bardstown & Louisville R. R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199; Swift *v.* Stebbins, 4 Stew. & Port. (Ala.) 447; Wright *v.* Bundy, 11 Ind. 398; Land Co. *v.* Peck, 112 Ill. 408.

[10] Willink *v.* Morris Canal & Banking Co. 4 N. J. Eq. (3 Gr.) 377.

brought by the trustees of a mortgage by a railroad company to foreclose the mortgage, the holders of the bonds secured are not necessary or proper parties complainant, though there may be circumstances which would authorize the court to admit any of them as defendants on their own application.[1]

If, however, the only object of the foreclosure suit is to reduce the property into possession, it is not necessary to make the *cestui que trust* a party to it.[2]

In a suit by a receiver appointed to collect a mortgage and bond and distribute it among certain persons named, the receiver should join these beneficiaries as parties complainant.[3]

1384. If a cestui que trust brings a bill to foreclose, the trustee is an indispensable party, because it is more particularly the legal estate that is affected by the decree of foreclosure and sale, and in case of redemption the trustee is the one to release the property. The trustee and the beneficiary should unite as plaintiffs.[4]

1385. A holder of bonds secured by a mortgage may file a bill to foreclose in behalf of himself and the other bondholders, whose rights the court will protect, though they be not made parties and do not appear,[5] especially if the mortgage trustee refuses to bring the action,[6] or has acquired an adverse interest.[7] This is in accordance with the equitable principles already stated, and adopted in the several codes, that one or more of many persons having a common interest, or of persons so numerous as to render it impracticable to bring them all before the court, may sue in behalf of the whole.

If in such case a master be appointed with instructions to report the names of the lien-holders, and the amount due each, those who appear before the master and prove their claims are

[1] Williamson *v.* N. J. Southern R. R. Co. 25 N. J. Ch. 13; McElrath *v.* Pittsburg & Steubenville R. R. Co. 68 Pa. St. 37. See Jones on Railroad Securities, §§ 431–437.

[2] Sill *v.* Ketchum, Harr. (Mich.) Ch. 423.

[3] Tyson *v.* Applegate, 40 N. J. Eq. 305, reversing *S. C.* 39 N. J. Eq. 365.

An exception to this rule has been made where the receiver is appointed under a statute which vests the title to the property in him. Miller *v.* Mackenzie, 29 N. J. Eq. 291.

[4] Story Eq. Pl. §§ 201, 209; Wood *v.* Williams, 4 Madd. 186; Hichens *v.* Kelly, 2 Sm. & G. 264; Martin *v.* McReynolds, 6 Mich. 70.

[5] Mason *v.* York & Cumberland R. R. Co. 52 Me. 82; Coe *v.* Beckwith, 16 Abb. (N. Y.) Pr. 296; Reid *v.* Evergreens, 21 How. (N. Y.) Pr. 319. See Blair *v.* Shelby Co. Agr. Soc. 28 Ind. 175; Bardstown & Louisville R. R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199.

[6] Davies *v.* N. Y. Concert Co. 41 Hun (N. Y.), 492.

[7] Webb *v.* Vt. Cent. R. R. Co. 20 Blatchf. 218.

as much bound by a judgment or order affecting the subject matter of the suit as if they had been formally made parties.[1]

1386. Trustee for creditors. — Another exception to the general rule is made in the case of a trustee of a fund for the benefit of creditors, who may generally sue without bringing the creditors before the court.[2] In many cases it would be impossible to make all the creditors parties, as where they are not designated except as a person's creditors.

1387. Upon the death of the mortgagee the right of action upon the mortgage securities is in his executor or administrator, and not in the heir of the mortgagee.[3] The land is regarded as merely a security for the money, and not as real estate absolutely vested in the mortgagee, and which upon his death goes to his heir, although this was the view formerly taken.[4] The entry of the mortgagee after forfeiture does not make the mortgaged property his real estate. Until foreclosure is complete the land belongs to the mortgagor. Neither does the absence of any personal obligation by bond, note, or covenant for the debt affect the right of the personal representative to collect the money due by the mortgage. The heir of the mortgagee holds the legal title in trust for the personal representative.

Of course the mortgagee may, by his will, settlement, or otherwise, provide that the mortgage security shall go to his heir as devisee; and then the right of the heir to sue rests upon the authority so given. One to whom a specific mortgage is bequeathed for life may maintain a bill to foreclose it, although there be a further bequest over to another of the remainder after the death of the first taker.[5] Such immediate legatee is entitled to the possession of the securities, and as well to the possession of the proceeds

[1] Carpenter *v.* Canal Co. 35 Ohio St. 307.

[2] Morley *v.* Morley, 25 Beav. 253; Knight *v.* Pocock, 24 Beav. 436; Thomas *v.* Dunning, 5 De G. & S. 618; Christie *v.* Herrick, 1 Barb. (N. Y.) Ch. 254.

[3] Woodruff *v.* Mutschler, 34 N. J. Eq. 33, and reporter's note; Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257.

It is provided by statute in several states that upon the death of a holder of a mortgage without having foreclosed the equity of redemption, the mortgage is personal assets in the hands of his executor or administrator.

Michigan: Compiled Laws 1871, p. 1393.

Maryland: Code 1860, art. 64, § 20.

Maine: R. S. 1871, ch. 90, § 1.

Ohio: R. S. (S. & C.) ch. 43, § 66.

Wisconsin: R. S. 1871, p. 1223.

Vermont: G. S. 1870, p. 393, §§ 27, 28.

[4] St. John *v.* Grabham (11 Car. 1), cited in Smith *v.* Smoult, 1 Ch. Cas. 88; Noy *v.* Ellis, 2 Ch. Cas. 220.

[5] Proctor *v.* Robinson, 35 Mich. 284. See Sargent *v.* Baldwin (Vt.), 13 Atl. Rep. 854.

of the same upon collection. It is necessary that such holder of securities should have the authority to convert them into money in order to obtain the income and protect the property from loss.[1]

A mortgage cannot be foreclosed in the name of the mortgagee after his decease, by direction of a devisee or legatee; but the latter may have a new foreclosure in his own name.[2]

If, upon final settlement of the estate, a mortgage be transferred to a guardian of certain minor heirs of the deceased mortgagee, an action upon it may be maintained by such guardian.[3]

Upon the final settlement of the mortgagee's estate, if the administrator hands over to the heirs certain mortgages which, being deemed of little value, had never been included in the administrator's account, or in the order of distribution, the heirs may, as the equitable owners, enforce them in their own name.[4]

1388. The personal representative of the mortgagee upon the death of the latter is the proper party to bring an action to foreclose the mortgage, this being personal assets. The administrator need not join the heirs with him in the proceeding.[5] The heirs cannot maintain the bill; nor can the devisee or legatee.[6] Formerly it was held that the heirs should be joined, because, if the mortgagor should redeem, there would be no one before the court by whom an effectual conveyance of the legal estate could be made.[7] But in this country the heir has been held a necessary party in only two or three states.[8] All the administrators or executors who have qualified should join in the suit.[9]

When, however, the heir of the mortgagee is in possession of the premises, the personal representative should make him a party, either plaintiff or defendant.[10]

When the administrator has acquired title through foreclosure he can bring ejectment for the land.[11]

1389. A foreign executor or administrator must generally

[1] Sutphen *v.* Ellis, 35 Mich. 446.

[2] White *v.* Secor, 58 Iowa, 533.

[3] Walter *v.* Wala, 10 Neb. 123.

[4] Stanley *v.* Mather, 31 Fed. Rep. 860.

[5] Dayton *v.* Dayton, 7 Bradw. (Ill.) 136; Plummer *v.* Doughty, 78 Me. 341.

[6] Kinna *v.* Smith, 3 N. J. Eq. (2 Green) 14; Woodruff *v.* Mutschler, 34 N. J. Eq. 33; Buck *v.* Fischer, 2 Colo. 182; Roath *v.* Smith, 5 Conn. 133; Ratliff *v.* Davis, 38 Miss. 107; Grattan *v.* Wiggins, 23 Cal. 16.

[7] Powell Mortg. 970; Wood *v.* Williams, 4 Madd. 185; Worthington *v.* Lee, 2 Bland (Md.) Ch. 678.

[8] McIver *v.* Cherry, 8 Humph. (Tenn.) 713; Atchison *v.* Surguine, 1 Yerg. (Tenn.) 400; Etheridge *v.* Vernoy, 71 N. C. 184, 187.

[9] 1 Daniell Ch. Pr. p. 226; Davies *v.* Williams, 1 Sim. 5.

[10] Huggins *v.* Hall, 10 Ala. 283; Osborne *v.* Tunis, 25 N. J. L. (1 Dutch.) 633.

[11] Kunzie *v.* Wixom, 39 Mich. 384.

receive appointment from the proper court in the state where the mortgaged land is situate, before he will be allowed to prosecute a suit to foreclose the mortgage.[1] The legal objection to allowing a foreign executor or administrator to prosecute such suit is that better protection is afforded to creditors of the deceased resident in the state where the property is situated, by requiring an appointment under the laws of that state, and thereby making the representative of the deceased liable to account in that state for the assets there collected by him; so that creditors and others in such state are not obliged to go to a foreign jurisdiction to prosecute their claims.[2]

Another practical advantage of the requirement is, that by such appointment in the state where the property is situated evidence of the authority of the personal representative to act in place of the deceased mortgagee, and to make discharge of the mortgage, is to be found in that state; and this alone is sufficient ground for requiring such appointment in every case, even when voluntary payment of the mortgage is to be made; or when an assignee, resident in the state, claims payment by virtue of an assignment to him by a foreign executor or administrator; for although such assignee can prosecute an action to foreclose the mortgage,[3] the record title to the estate made through such foreclosure is objectionable, inasmuch as there is no evidence in the state of the authority by which the foreign executor or administrator made the assignment.[4]

Objection that the foreign executor or administrator has no standing in court to enforce the mortgage must be made by demurrer or answer, or it will be deemed to have been waived.[5]

In a state where a foreign executor is by statute allowed to sue like any other non-resident,[6] the right of such executor to maintain an action on securities in his hands is sufficiently shown by the production of letters testamentary issued by the court of another state having general jurisdiction of the settlement of estates,

[1] Trecothick *v.* Austin, 4 Mason, 16 33; Williams *v.* Storrs, 6 Johns. (N. Y.) Ch. 353; Brown *v.* Brown, 1 Barb. (N. Y.) Ch. 189; Porter *v.* Trall, 30 N. J. Eq. 106. See Woodruff *v.* Mutschler, 34 N. J. Eq. 33, note; Dial *v.* Gary, 24 S. C. 572.

[2] Petersen *v.* Chemical Bank, 32 N. Y. 21, 43; *S. C.* 29 How. Pr. 240.

[3] Petersen *v.* Chemical Bank, *supra;* and see Smith *v.* Webb, 1 Barb. (N. Y.) 230, that a legatee under a will proved in another state may sue.

[4] See § 797.

[5] McBride *v.* Farmers' Bank of Salem, 26 N. Y. 450, 457; Zabriskie *v.* Smith, 13 N. Y. 322.

[6] As in Nebraska: Comp. St. 1885, p. 324, ch. 24.

although the testator was a resident of still another state, where he died, and the recitals of the letters only show that he had property in the state, but not in the county, where the letters were issued.[1]

1390. Mortgage to executor. — A mortgage made to A. B., "acting executor of the estate of T. T., deceased," is *primâ facie* the private property of A. B., and upon his decease a bill to foreclose it should be brought by his personal representative; but if it be alleged in the bill and shown that the mortgage is part of the assets of the estate of T. T., an administrator with the will annexed of his estate may foreclose it.[2] The personal representatives of A. B. should be made parties to the suit, because *primâ facie* the security vests in them.[3]

1391. When one person holds two mortgages upon the same premises, he is not allowed to bring separate foreclosure suits.[4] If they are of different dates and secure different debts, when the decree is for a sale of the property it should direct the payment of the first mortgage out of the proceeds of sale, and that the residue be paid into court for the benefit of subsequent incumbrancers.[5] In case of a strict foreclosure, one decree is made embracing both mortgage debts, instead of two decrees each limiting a time of redemption for each mortgage.[6] The holder of the two mortgages may foreclose them in one suit, although they were given by different persons, if made to secure the same debt.[7] Where there are several simultaneous mortgages of the same property, though they secure different debts, one not entitled to a preference over the others cannot be foreclosed alone. The complainant should ask the other mortgagees to join with him in foreclosing all the mortgages, and on their refusal so to do should make them defendants.[8]

1392. A mortgage executed to persons in an official capacity may be foreclosed by their successors in the office in their own names as equitable assignees of the security; as in case of

[1] Cheney *v.* Stone, 29 Fed. Rep. 885.

[2] Peck *v.* Mallams, 10 N. Y. 509; People *v.* Keyser, 28 N. Y. 226; Renaud *v.* Conselyea, 4 Abb. (N. Y.) Pr. 280; affirmed, 5 Ib. 346.

[3] Peck *v.* Mallams, *supra.*

[4] Roosevelt *v.* Ellithorp, 10 Paige (N. Y.), 415; Newman *v.* Ogden, 6 Ch. Dec. (N. Y.) 40; Kellogg *v.* Babcock, 1 Ch. Dec. (N. Y.) 47; Fitzhugh *v.* McPherson, 3 Gill (Md.), 408.

[5] Kellogg *v.* Babcock, *supra.*

[6] Phelps *v.* Ellsworth, 3 Day (Conn.), 397.

[7] McGowan *v.* Branch Bank at Mobile, 7 Ala. 823.

[8] Potter *v.* Crandall, Clarke (N. Y.), 119.

a mortgage given to the receivers of an insolvent corporation. The successor is in such case an equitable assignee, and though he could not sue in his own name at law he may do so in equity.[1]

If the mortgagee becomes bankrupt, his assignee may foreclose the mortgage without joining him as a party. Though there be a possibility that there may be property more than enough to pay the creditors, the presumption from the adjudication is that there will not be; and therefore he is not regarded as having any interest sufficient to entitle him to be made a party. And such would be the case also where a corporation holding a mortgage has been declared insolvent, and its property placed in the hands of a receiver.[2]

1393. A wife owning a mortgage as her separate property cannot join her husband as a co-plaintiff to foreclose it. Objection, however, to the joining of the husband should be taken by demurrer, and cannot be insisted upon at the hearing.[3] When the note and mortgage were given to a husband and wife as security for money loaned by the wife, upon the death of the husband the wife was held to be the proper party to sue in her own name, on either of two grounds, — as surviving mortgagee, or because the mortgage concerned her separate estate.[4]

In a suit by a married woman to foreclose a mortgage payable to her, where the bonds and mortgage are in possession of her husband, who is living apart from her and beyond the jurisdiction of the court, the husband should be made a party to the suit; but if there have been laches and delay on his part, he should not be allowed to come in and defend except upon terms.[5]

PART II.

OF PARTIES DEFENDANT.

Who are the Necessary or Proper Parties.

1394. General principles. — In respect to the defendants in foreclosure suits they are either necessary or proper parties.[6] A

[1] Iglehart *v.* Bierce, 36 Ill. 133.
[2] Iglehart *v.* Bierce, *supra.*
[3] Bartlett *v.* Boyd, 34 Vt. 256.
[4] Shockley *v.* Shockley, 20 Ind. 108.
[5] Ruckman *v.* Stephens, 11 Fed. Rep. 93.
[6] The codes of the several states before mentioned provide that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein." See Pomeroy's Remedies, § 271.

necessary party is one whose presence before the court is indispensable to the rendering of a judgment which shall have any effect upon the property; without whom the court might properly refuse to proceed, because its decree would be practically nugatory. The person who in this sense is a necessary party defendant is the owner of the equity of redemption; but the ownership of the land subject to the mortgage may be distributed among several persons, one of whom is no more necessary to the rendering of an effectual judgment than another. Moreover the equity of redemption may have been conveyed again and more than once in mortgage, and the person who holds the title subject to the mortgages may have an interest which is in fact of no value, while the holders of the subsequent mortgages have valuable interests; yet according to the cases the owner of the unconditional title which is of no value is a necessary party, and the subsequent mortgagees are only proper parties. It is not, however, the value of the interest held by any one which in any way determines whether he is a necessary party or not; for although the interest of the owner of the equity may be valueless, yet a decree of foreclosure and sale is effectual in cutting off that interest, and in transferring the title subject to the rights of subsequent incumbrancers, if they have not been made parties. The decree is at any rate effectual in stopping the further transfer or incumbrance of the title, and this is doubtless the reason why the owner of the equity of redemption is regarded as a necessary party.

In one sense every person who has acquired any interest in the property subsequent to the mortgage is a necessary party to the suit for foreclosure; whether that interest be by way of a mortgage or judgment lien, an inchoate right of tenancy in dower or curtesy, or an unconditional estate in fee; because, in order to make the foreclosure complete, and to transfer a perfect title by the sale, it is necessary that the holder of every such right or interest should be brought before the court. A party may be necessary in this sense, although this term has generally been used only to designate the present owner of the property, without whom the general ownership of the property cannot be transferred by a sale under the decree. It is doubtless for this reason that there is much confusion in the cases as to the persons who are necessary parties to the suit. As a practical matter, however, the distinction between necessary and proper parties is not of much consequence; for the suit, though effectual in cutting off

the estate or interest of the parties to it, is generally ineffectual as a foreclosure, unless every interest subsequent to the mortgage is cut off by the decree and sale under it; for if a stranger purchases, he may decline to take the title if any lien or right is left outstanding; and if the mortgagee himself buys, he only subjects himself in such case to the expense of another suit, to get rid of the rights that others still have in the property.

To obtain a judgment for any deficiency there may be after the sale, the debtor and any other person who may have assumed the debt are necessary parties; but as the primary object of the suit is to divest the title of the holder of the equity of redemption, and of others interested in it, and to transfer this by sale to a purchaser, the fact that one is personally liable for the debt makes him a proper party, but not, in the general use of the term, a necessary one.

1395. When a party in interest, other than the owner of the equity of redemption, is not made a party to the bill, the foreclosure is not generally for this reason wholly void. It is effectual as against those persons interested in the equity who are made parties. The sale vests the estate in the purchaser, subject to redemption by the owner of the equity, or other person interested in it, who was not made a party to the proceedings.[1] His only remedy, however, is to redeem. He cannot maintain ejectment against the purchaser. He cannot have the sale set aside by intervening by petition in the foreclosure suit. His only right is the right of redemption.[2] The sale, though it fails to be effectual in

[1] Story's Eq. Pleadings, § 193. **Indiana**: Matcalm *v.* Smith, 6 McLean, 416; Martin *v.* Noble, 29 Ind. 216. **Illinois**: Kelgour *v.* Wood, 64 Ill. 345; Ohling *v.* Luitjens, 32 Ill. 23; Cutter *v.* Jones, 52 Ill. 84; Hodgen *v.* Guttery, 58 Ill. 431; Robins *v.* Arnold, 11 Ill. App. 434; Strang *v.* Allen, 44 Ill. 428; Dunlap *v.* Wilson, 32 Ill. 517; Bradley *v.* Snyder, 14 Ill. 263; Richardson *v.* Hadsall, 106 Ill. 476. **Mississippi**: Georgia Pacific R. R. Co. *v.* Walker, 61 Miss. 481. **Ohio**: Frische *v.* Kramer, 16 Ohio, 125. **Texas**: Hall *v.* Hall, 11 Tex. 526; Webb *v.* Maxan, 11 Tex. 678, 686. **Wisconsin**: Tallman *v.* Ely, 6 Wis. 244; Hodson *v.* Treat, 7 Wis. 263. **Iowa**: Porter *v.* Kilgore, 32 Iowa, 379; Douglass *v.* Bishop, 27 Iowa, 214; Veach *v.* Schaup, 3 Iowa, 194; Spurgin *v.* Adamson, 62 Iowa, 661. **Missouri**: Valentine *v.* Havener, 20 Mo. 133. **New Jersey**: Brundred *v.* Walker, 12 N. J. Eq. 140; McCall *v.* Yard, 11 N. J. Eq. 58; *S. C.* 9 N. J. Eq. 358. **North Carolina**: Vanhorn *v.* Duckworth, 7 Ired. Eq. 261. **California**: Haffley *v.* Maier, 13 Cal. 13.

[2] **Wisconsin**: Person *v.* Merrick, 5 Wis. 231; Farwell *v.* Murphy, 2 Wis. 533; Green *v.* Dixon, 9 Wis. 532. **Connecticut**: Goodman *v.* White, 26 Conn. 317. **Maine**: Thompson *v.* Chandler, 7 Me. 377. **Illinois**: Bradley *v.* Snyder, *supra.* **New York**: Benedict *v.* Gilman, 4 Paige, 58: Peabody *v.* Roberts, 47 Barb. 91; Brainard *v.* Cooper, 10 N. Y. 356. **New Jersey**:

every other respect, operates as an assignment of the mortgage and all the mortgagee's rights to the purchaser, who may proceed *de novo* to foreclose.[1] If in such case the prior mortgagee himself purchases at the sale, he becomes merely a mortgagee in possession.[2]

It is in many cases a matter of much expense and inconvenience to join as parties all the subsequent incumbrancers; but it is much more expensive and inconvenient to omit any. A purchaser will hardly take an estate which may be redeemed, and thus incur the liability of a suit to redeem, and of being called upon to account.[3] Of course, it is the right of the plaintiff to bring all subsequent parties in interest before the court, but as the law now stands it is not his absolute duty to do so; or, in other words, the court will not compel the plaintiff, on the motion of any other party, to bring in those who have subsequent liens, however desirable it may be to make a final settlement of the

McCall *v.* Yard, 9 N. J. Eq. 358. **Iowa**: Redfield *v.* Hart, 12 Iowa, 355; Knowles *v.* Rablin, 20 Iowa, 101; Heimstreet *v.* Winnie, 10 Iowa, 430. **Kentucky**: Cooper *v.* Martin, 1 Dana, 23. **North Carolina**: Isler *v.* Koonce, 83 N. C. 55; Hinson *v.* Adrian, 86 N. C. 61. **South Carolina**: Douthit *v.* Hipp, 23 S. C. 205; Adger *v.* Pringle, 11 S. C. 527, 545.

[1] Peabody *v.* Roberts, 47 Barb. (N. Y.) 91; Anson *v.* Anson, 20 Iowa, 55; Ten Eyck *v.* Casad, 15 Iowa, 524.

[2] Walsh *v.* Rutgers F. Ins. Co. 13 Abb. N. Y. Pr. 33; Vanderkemp *v.* Shelton, 11 Paige (N. Y.), 28; Jordan *v.* Sayre (Fla.), 3 So. Rep. 329.

[3] In the earlier cases in England the distinction between parties indispensable to the suit, and proper parties to it was not always taken. In Bishop of Winchester *v.* Beavor, 3 Ves. Jun. 314, it was objected by the second mortgagees, who were parties to a suit for the foreclosure of a first mortgage, that a judgment creditor was not joined. At first the Master of the Rolls, afterwards Lord Alvanley, inclined against the objection, "stating the inconvenience that would arise from the necessity of making all the judgment creditors of the mortgagor parties." After argument he said: "The usual and common practice, almost without exception, is to make all incumbrancers parties. If I lay down that it is absolutely necessary, I arm a man with a shield to ward off a foreclosure. But the question is, whether it is not proper in this case. I think it would be too much to refuse it. Where there is no affectation of delay, that I can see, I do not think the general point so clear as to determine it upon this case. I hope the court is not bound to insist upon all incumbrancers being parties; but I am perfectly satisfied that in this case it is by much the least evil to order the cause to stand over till this single incumbrancer is made a party." Mr. Calvert, in his Treatise on Parties, p. 186, says: "The general practice will not of necessity bind a mortgagee, who for particular reasons, such as costs and the small value of the security, desires to exclude from the record particular mortgagees. There is no rule to the effect that there shall be only one foreclosure bill of the same estate, for there may, according to the acknowledged practice, be as many foreclosures as there are mortgagees; provided the suits are filed in a series commencing with the last mortgagee. It is said that a mortgagor ought not to be liable to successive suits; yet he will be if the suits were instituted in that series."

rights of all persons interested in the property. If for any reason a party in interest is not made a party, his interest may be foreclosed in a subsequent action.[1]

1396. All parties in interest should be joined, inasmuch as it is true that the proper object of a bill in equity to foreclose a mortgage is to cut off all rights subsequent to the mortgage.[2] The rights of any one so interested not made a party to the bill are not affected by the decree of foreclosure and the sale under it, but he may redeem as before the sale.[3] The proceeding is not *in rem* but *in personam.*

One made a defendant to a foreclosure suit, whose connection with the mortgage or with the equity of redemption is not shown by the bill, is not a proper party, and is entitled, so far as he is concerned, to have the bill dismissed with costs.[4]

[1] Merriman *v.* Hyde, 9 Neb. 113.

[2] Clark *v.* Reyburn, 8 Wall. 318; Caldwell *v.* Taggart, 4 Pet. 190. **New York**: Bloomer *v.* Sturges, 58 N. Y. 168; Kay *v.* Whittaker, 44 N. Y. 565; M'Gown *v.* Yerks, 6 Johns. Ch. 450; Ensworth *v.* Lambert, 4 Johns. Ch. 605; Vanderkemp *v.* Shelton, 11 Paige, 28; Haines *v.* Beach, 3 Johns. Ch. 459. **Iowa**: Chase *v.* Abbott, 20 Iowa, 154; Wright *v.* Howell, 35 Iowa, 288. **Indiana**: Gaines *v.* Walker, 16 Ind. 361; Proctor *v.* Baker, 15 Ind. 178; Martin *v.* Noble, 29 Ind. 216; Holmes *v.* Bybee, 34 Ind. 262; Hasselman *v.* McKernan, 50 Ind. 441; Coombs *v.* Carr, 55 Ind. 303; Wyman *v.* Russell, 4 Biss. 307. **Alabama**: Judson *v.* Emanuel, 1 Ala. 598; Hunt *v.* Acre, 28 Ala. 580; Boykin *v.* Rain, 28 Ala. 332; Duval *v.* McLoskey, 1 Ala. 708. **Wisconsin**: Armstrong *v.* Pratt, 2 Wis. 298; Rowley *v.* Williams, 5 Wis. 151; Moore *v.* Cord, 14 Wis. 213; Stark *v.* Brown, 12 Wis. 572. **Connecticut**: Smith *v.* Chapman, 4 Conn. 344; Swift *v.* Edson, 5 Conn. 531; Goodman *v.* White, 26 Conn. 317, 322. **South Carolina**: Manufacturing Co. *v.* Price, 4 S. C. 338. **New Jersey**: McCall *v.* Yard, 11 N. J. Eq. 58. **California**: Hayward *v.* Stearns, 39 Cal. 58; Hefner *v.* Urton, 12 Pac. Rep. 486. **Oregon**: Besser *v.* Hawthorn, 3 Oreg. 129; Sellwood *v.* Gray, 11 Oreg. 534. **Florida**: Wilson *v.* Russ, 17 Fla. 691. **Texas**: Hallard *v.* Carter, 9 S. W. Rep. 92.

[3] Cockes *v.* Sherman, 2 Freem. 13 (1676). Here were five mortgages of the same land. The fifth mortgagee bought the first three mortgages, and then foreclosed without making the fourth mortgagee a party. Lord Chancellor Finch held that the fourth mortgagee had an equity of redemption. "The fourth mortgagee was not concluded by this decree, being never made a party to it; and although there be a great mischief on one hand that a mortgagee, after a decree against the mortgagor to foreclose him of his equity of redemption, shall never know when to be at rest, — for if there be any other incumbrances he is still liable to an account, — yet the inconvenience is far greater on the other side; for if a mortgagee, that is a stranger to this decree, should be concluded, he would be absolutely without remedy and lose his whole money, when perhaps a decree may be huddled up purposely to cheat him, and in the mean time (he being paid his interest) may be lulled asleep, and think nothing of it; whereas, on the other hand, there is no prejudice but being liable to the trouble of an account; and if so be that were stated *bonâ fide* between the mortgagor and mortgagee in the suit wherein the decree was obtained, that shall be no more ravelled into, but so long shall stand untouched."

[4] Havens *v.* Jones, 45 Mich. 253; Oly-

1397. Trustees and beneficiaries. — The trustee in a deed of trust is a necessary party because he holds the legal title.[1]

As a general rule, all persons beneficially interested in the equity of redemption should be made parties to the suit as well as the trustees who hold the legal title. They have an interest in the controversy adverse to the plaintiff.[2] This was the English rule until it was enacted[3] that the trustees may represent the persons beneficially interested, so that the latter need not be made parties to the suit, unless the court in its discretion orders them to be joined. Under this statute, however, it seems that the court will require that the *cestuis que trust* be made parties where the trustees have not complete power over the estate, or have not in their control funds applicable to the purpose of redemption.[4] Under this general rule persons having a vested remainder in fee in the equity of redemption should be made parties to the bill, though the trustee is made a defendant; and the fact that the trustee executed the mortgage under authority of the court does not excuse omitting them.[5]

If there be a subsequent trust deed of the property in the nature of a mortgage, so that it becomes necessary to make the holders of such trust deed parties to a suit for the foreclosure of a prior lien, both the trustee and the *cestui que trust* should be made parties defendant.[6]

1398. When beneficiaries are numerous. — Although as a general rule a nominal trustee cannot be made a defendant alone without joining with him his *cestuis que trust*, this rule will not be

phant *v.* St. L. Ore & Steel Co. 23 Fed. Rep. 465.

[1] Gardner *v.* Brown, 21 Wall. 36.

[2] Coles *v.* Forrest, 10 Beav. 552; Calverley *v.* Phelp, Madd. & G. 229; Tylee *v.* Webb, 6 Beav. 552, 557; Goldsmid *v.* Stonehewer, 9 Hare, App. xxxviii; *S. C.* 17 Jur. 199; Newton *v.* Egmont, 4 Sim. 574; *S. C.* 5 Ib. 130; Lanriat *v.* Stratton, 6 Sawyer, 339; Union Bank at Massillon *v.* Bell, 14 Ohio St. 200; Mavrich *v.* Grier, 3 Nev. 52, 57; Delaplaine *v.* Lewis, 19 Wis. 476; Johnson *v.* Robertson, 31 Md. 476, 491; Williamson *v.* Field, 2 Sandf. (N. Y.) Ch. 533; King *v.* McVickar, 3 Sandf. (N. Y.) Ch. 192; Leggett *v.* Mut. Life Ins. Co. of N. Y. 64 Barb. (N. Y.) 23; Rawson *v.* Lampman, 5 N. Y. 456; Nodine *v.* Greenfield, 7 Paige (N. Y.), 544.

[3] 15 & 16 Vict. ch. 86, § 42.

[4] Goldsmid *v.* Stonehewer, *supra;* Tuder *v.* Morris, 1 Sm. & G. 503. See, also, Yonng *v.* Ward, 10 Hare, lix; Siffken *v.* Davis, Kay, xxi; Cropper *v.* Mellersh, 1 Jur. N. S. 299.

[5] Williamson *v.* Field, 2 Sandf. (N. Y.) Ch. 533.

[6] Illinois: Clark *v.* Manning, 95 Ill. 580; Gaytes *v.* Franklin Sav. Bank, 85 Ill. 256; Scanlan *v.* Cobb, 85 Ill. 296; Bayard *v.* McGraw, 1 Bradw. 134; Woolner *v.* Wilson, 5 Bradw. 439; Shinn *v.* Shinn, 91 Ill. 482; Walsh *v.* Truesdell, 1 Bradw. 126.

adhered to when great inconvenience or expense would be incurred by making them parties. In a case where the trustee represented two hundred and fifty owners or subscribers, it was held that he sufficiently represented them as defendant;[1] and so trustees who represented a large number of bondholders under a second mortgage were held to be the only defendants required in a suit to foreclose a prior mortgage.[2] This exception to the rule applies also where the mortgaged property is held in trust for numerous creditors.[3] The plaintiff, however, should state distinctly and particularly the grounds on which he omits to make the creditors or other persons interested in the matter in controversy parties to the suit.[4] Even a selected number of creditors may sufficiently represent the whole number; but in such case the trustees should be made parties, for the protection of the interests of the whole body of creditors.[5]

1399. Trustee. — It has been held in some cases, however, that as the trustee and *cestui que trust* really represent but one interest, and the trustee is the holder of the legal interest, he alone should be made a party to the suit, as he would be the party entitled to redeem. This is especially the case where the trust is for the benefit of creditors.[6]

1400. Equitable interest. — A person having an equitable interest in the mortgaged premises by reason of having advanced money for erecting buildings thereon, and who by agreement with the owner entered into possession of the premises before the mak-

[1] Van Vechten *v.* Terry, 2 Johns. (N. Y.) Ch. 197. Chancellor Kent said: "It would be intolerably oppressive and burdensome to compel the plaintiffs to bring in all the *cestuis que trust.* The delay and the expense incident to such a proceeding would be a reflection on the justice of the court."

[2] N. J. Franklinite Co. *v.* Ames, 12 N. J. Eq. (1 Beas.) 507.

[3] Willis *v.* Henderson, 5 Ill. (4 Scam.) 13; and see Swift *v.* Stebbins, 4 Stew. & Port. (Ala.) 447.

[4] Holland *v.* Baker, 3 Hare, 68.

[5] Holland *v.* Baker, *supra.* Wigram, V. C., in this case said: "I do not doubt that the court does allow a selected number to represent a numerous body of defendants, whose interests are sought to be adversely affected in a suit. Lord Eldon repeatedly said it might be done, if the purposes of justice required it; and Lord Cottenham, in Attwood *v.* Smith (not reported, but see 4 Myl. & C. 635), after saying that the right course was to bring all parties before the court, observed, that courts of justice are bound to have regard to the mode in which the affairs of mankind are conducted; and when, in consequence of the mode of dealing, it would be impossible to work out justice if the rule requiring all persons to be present were not departed from, it must be relaxed rather than be allowed to stand as an obstruction to justice."

[6] Grant *v.* Duane, 9 Johns. (N. Y.) 591, 612; Willis *v.* Henderson, *supra;* Paschal's Dig. of Dec. (Texas) §§ 18531, 18533.

ing of the mortgage, and continued in possession down to the time of the sale of them under foreclosure suit, should be made a party to the proceedings; otherwise his rights will not be barred. His continued possession is constructive notice of his equitable rights.[1] A person having only a remote or contingent interest, without any estate or lien, may properly be made a party.[2]

1401. Remainder-men. — When there are estates in remainder or reversion after a life estate in the equity of redemption, it is generally sufficient to bring before the court the first person in being who has a vested estate of inheritance, together with those claiming the life estate, and omitting any who may claim a reversion after such vested estate.[3] Those having merely future contingent interests are not necessary parties, if the person who has the first estate of inheritance is before the court. If the estate is entailed, it is sufficient to make the first tenant in tail *in esse* a party if there are no prior estates.[4] This is upon the principle of representation. "The first tenant in tail," says Lord Camden, "is sufficient; he sustains the interests of everybody: those in remainder are considered ciphers." [5]

But it is not enough to make the persons holding the life interest in the mortgaged premises parties to the bill without joining any one having a remainder in fee; as in case the mortgagor makes a devise of the premises to trustees in trust for his children for life, remainder in fee to his grandchildren: the latter must be made parties in order to cut off their right of redemption. The trustees cannot represent the whole estate.[6]

After a conveyance of lands subject to mortgage in trust for the benefit of children, both those in being and those to be born, all the children *in esse* at the time of the filing of a bill of fore-

[1] Noyes *v.* Hall, 97 U. S. 34; De Ruyter *v.* St. Peter's Church, 2 Barb. (N. Y.) Ch. 655.

[2] Johnson *v.* Britton, 23 Ind. 105; Parrott *v.* Hughes, 10 Iowa, 459.

[3] Gore *v.* Stackpoole, 1 Dow, 18, 31; Reynoldson *v.* Perkins, Ambl. 564; Eagle F. Ins. Co. *v.* Cammet, 2 Edw. (N. Y.) Ch. 127; Cholmondeley *v.* Clinton, 2 Jac. & W. 133; Chappell *v.* Rees, 1 De G., M. & G. 393; Hopkins *v.* Hopkins, 1 Atk. 581, 590; Fishwick *v.* Lowe, 1 Cox, 411; Kerrick *v.* Safferey, 7 Sim. 317; Nodine *v.* Greenfield, 7 Paige (N. Y.), 544.

[4] Yates *v.* Hambly, 2 Atk. 237; Fishwick *v.* Lowe, 1 Cox, 411; Lloyd *v.* Johnes, 9 Ves. 37; Giffard *v.* Hort, 1 Sch. & Lef. 386, 408; Roscarrick *v.* Barton, 1 Ch. Cas. 217; Platt *v.* Sprigg, 2 Vern. 303; Williamson *v.* Field, 2 Sandf. (N. Y.) Ch. 533.

[5] Reynoldson *v.* Perkins, Ambl. 564.

[6] Leggett *v.* Mut. Life Ins. Co. of N. Y. 64 Barb. (N. Y.) 23, 36.

closure should be made parties. A decree against the trustee alone does not take away their right to redeem.[1]

1402. The mortgagor, if he remains the owner of the equity of redemption, is a necessary party to a foreclosure suit, because without his presence the primary object of the suit, a decree of foreclosure or sale, cannot be obtained.[2] Even if he has wholly parted with his interest in the premises he should be made a party to the bill, if a judgment is sought against him for any deficiency of the debt that may remain after applying to it the proceeds of the sale.[3] Therefore, where the laws provide for a judgment for such deficiency he is always a proper party, though not a necessary one, after he has conveyed his interest, so far as effecting a complete foreclosure of the equity of redemption is concerned. If no personal judgment is sought against the mortgagor, or none can be had, he should not be made a party to the bill after he has ceased to have any interest in the subject of the mortgage.[4]

1403. If the mortgagor retains an interest in the property, such that he may again become possessed of the equity of re-

[1] Clark *v.* Reyburn, 8 Wall. 318.

[2] Story Eq. Pl. § 197; Farmer *v.* Curtis, 2 Sim. 466; Fell *v.* Brown, 2 Bro. Ch. 276; Palk *v.* Clinton, 12 Ves. 48; Caddick *v.* Cook, 32 Beav. 70. In Kay *v.* Whittaker, 44 N. Y. 565, 572, Hunt, J., said, obviously with reference to the case of the mortgagor's still remaining the owner of the equity: "To sustain a foreclosure suit, the mortgagor is a necessary party, and generally the only necessary one. Others may be joined if it is desired to cut off their interests, as a wife, a subsequent purchaser, or subsequent mortgagee. They are not indispensable parties. The action is good without them; and the only effect of their absence is that their interests are not affected by the proceeding." In a few cases the mortgagor has been spoken of as a proper party merely. Semple *v.* Lee, 13 Iowa, 304; Sumner *v.* Coleman, 20 Ind. 486. But it is conceived that this is an inaccuracy in the use of terms.

[3] Delaplaine *v.* Lewis, 19 Wis. 476; Bigelow *v.* Bush, 6 Paige (N. Y.), 343; Shaw *v.* Hoadley, 8 Blackf. (Ind.) 165; Van Nest *v.* Latson, 19 Barb. (N. Y.) 604; Heyman *v.* Lowell, 23 Cal. 106; Michigan Ins. Co. *v.* Brown, 11 Mich. 265; Worthington *v.* Lee, 2 Bland (Md.), 678; Moore *v.* Starks, 1 Ohio St. 369; Cord *v.* Hirsch, 17 Wis. 403; Semple *v.* Lee, *supra;* Johnson *v.* Monell, 13 Iowa, 300; Murray *v.* Catlett, 4 Greene (Iowa), 108; Williams *v.* Meeker, 29 Iowa, 292, 294; Huston *v.* Stringham, 21 Iowa, 36; Chester *v.* King, 2 N. J. Eq. (1 Green) 405; Vreeland *v.* Loubat, Ib. 104.

If the mortgagor be not a resident of the state, service must be had in the manner provided by statute for service upon absent defendants, or, in the absence of such statute, in the manner ordered by court. When service is made by publication, it is generally provided either that an entry of judgment shall be deferred, or that judgment may be opened if the defendant appears within a limited time. See Brown *v.* Conger, 10 Neb. 236.

[4] Brown *v.* Stead, 5 Sim. 535; Swift *v.* Edson, 5 Conn. 531; Broome *v.* Beers, 6 Conn. 198; Wilkins *v.* Wilkins, 4 Port. (Ala.) 245; Inge *v.* Boardman, 2 Ala. 331; Stevens *v.* Campbell, 21 Ind. 471; Burkham *v.* Beaver, 17 Ind. 367.

demption, he must be made a party; as, for instance, if there has been a voidable or irregular sale of his equity under a subsequent mortgage.[1] It would seem that until he has actually voided the sale the purchaser might properly be regarded as the necessary party to the suit, because he would be the apparent holder of the equity of redemption; and that the mortgagor would be a proper party only by reason of his possible right to redeem. Although a mortgagor has entered into a binding contract to convey the property, he is not a necessary party until he actually makes the conveyance. The person contracting to purchase is, however, a proper party; and the court may even order him to be brought in before entering a decree.[2]

In some cases it has been held that the circumstance that the mortgagor has conveyed the premises by a warranty deed gives him a sufficient interest in a suit to foreclose the mortgage to authorize his being made a party defendant.[3] But these decisions are not generally sustained. The mortgagor, however, is presumed to retain his interest in the property, and to be a necessary party, unless the bill discloses a state of facts which render it unnecessary to make him a party.[4]

The grantor in an absolute deed, intended as a mortgage, is not a necessary party when the defeasance is executed to another, to secure whose debt the deed was made. He is a proper party, though generally he may be omitted. If the complainant, however, has any doubt of the validity of the conveyance, he may very properly join him to set the doubt at rest.[5]

1404. The mortgagor, after he has conveyed the whole of the premises mortgaged, is not a necessary party to the suit; nor indeed is he a proper party, unless a personal judgment for any deficiency there may be, after applying the property to the debt, is sought against him.[6] The decree is conclusive upon the

[1] Merritt *v.* Phenix, 48 Ala. 87; and see, also, Huston *v.* Stringham, 21 Iowa, 36.

[2] Crooke *v.* O'Higgins, 14 How. (N. Y.) Pr. 154.

[3] Gifford *v.* Workman, 15 Iowa, 34; Huston *v.* Stringham, *supra.*

[4] Kunkel *v.* Markell, 26 Md. 390.

[5] Weed *v.* Stevenson, Clarke (N. Y.), 166.

[6] Miller *v.* Thompson, 34 Mich. 10; Hibernia Savings & Loan Soc. *v.* Herbert, 53 Cal. 375; Osborne *v.* Crump, 57 Miss. 622; Johnson *v.* Foster, 68 Iowa, 140; Johnson *v.* Monell, 13 Iowa, 300; Root *v.* Wright, 21 Hun (N. Y.), 344; Bennett *v.* Mattingly (Ind.), 10 N. E. Rep. 299; Petry *v.* Ambrosher, 100 Ind. 510; Davis *v.* Hardy, 76 Ind. 272; Miner *v.* Smith, 53 Vt. 551; Soule *v.* Albee, 31 Vt. 142; Kingsley *v.* Scott, 58 Vt. 470; Townsend Sav. Bank *v.* Epping, 3 Woods, 390; Hammons *v.* Bigelow (Ind.), 17 N. E. Rep. 192; Boutwell *v.* Steiner (Ala.) 4 So. Rep. 184.

title without him.[1] He is, however, so far a proper party in case a personal judgment against him is sought, that this judgment is conclusive against him in any future litigation between the same parties, and he may take an appeal from it.[2] If he is not made a party, and no one under him has become personally liable for the debt, the decree, after finding the amount of the debt, can merely direct a sale of the premises in satisfaction of the debt.[3] And such would be the case, also, when the debt is barred by the statute of limitations, although he is made a party.[4]

1405. If the mortgagor has conveyed away only a portion of the premises, and remains owner of the residue, he may still be regarded as a necessary party, and the purchaser of the part only a proper one, because a decree against the mortgagor alone would have something to act upon, and a decree against the purchaser of a portion of the property is not indispensable, though the portion sold to him would remain unaffected if he was not made a party.[5]

A sale of the mortgagor's interest upon execution does away with the necessity of making him a party as effectually as a voluntary sale would.

A partition of the estate subsequent to the mortgage affects the mortgagee so far only that he must see that all persons who become interested in the property by the partition shall be made parties to the proceedings to foreclose.

1406. The holder of the equity of redemption by purchase from the mortgagor is, of course, an essential party to a bill to bar the equity by foreclosure.[6] Equally with the mortgagor he

[1] Soule *v.* Albee, 31 Vt. 142; Drury *v.* Clark, 16 How. (N. Y.) Pr. 424; Daly *v.* Burchell, 13 Abb. N. S. (N. Y.) Pr. 264; Stevens *v.* Campbell, 21 Ind. 471; Johnson *v.* Monell, 13 Iowa, 300; Belloc *v.* Rogers, 9 Cal. 123; Swift *v.* Edson, 5 Conn. 531; Delaplaine *v.* Lewis, 19 Wis. 476; Cord *v.* Hirsch, 17 Wis. 403.

[2] Andrews *v.* Stelle, 22 N. J. Eq. 478.

[3] Jones *v.* Lapham, 15 Kans. 540.

[4] Mich. Ins. Co. *v.* Brown, 11 Mich. 265. See, also, Rhodes *v.* Evans, Clarke (N. Y.), 168.

[5] Douglass *v.* Bishop, 27 Iowa, 214, 216; Mims *v.* Mims, 35 Ala. 23; Hull *v.* Lyon, 27 Mo. 570; Crenshaw *v.* Thackston, 14 S. C. 437.

[6] **England**: Peto *v.* Hammond, 29 Beav. 91; Maule *v.* Beaufort, 1 Russ. 349. **New York**: Reed *v.* Marble, 10 Paige, 499; Hall *v.* Nelson, 14 How. Pr. 32; St. John *v.* Bumpstead, 17 Barb. 100; Williamson *v.* Field, 2 Sandf. Ch. 533; Watson *v.* Spence, 20 Wend. 260; Hall *v.* Nelson, 23 Barb. 88. **California**: Bludworth *v.* Lake, 33 Cal. 265; Skinner *v.* Buck, 29 Cal. 253; Boggs *v.* Hargrave, 16 Cal. 559; De Leon *v.* Higuera, 15 Cal. 483; Luning *v.* Brady, 10 Cal. 265. **Wisconsin**: Cord *v.* Hirsch, *supra;* Moore *v.* Cord, 14 Wis. 213; Stark *v.* Brown, 12 Wis. 572; Hodson *v.* Treat, 7 Wis. 263; State Bank *v.* Abbott, 20 Wis. 570. **Minnesota**: Nichols *v.* Randall, 5 Minn. 304,

is unaffected by any foreclosure proceding to which he is not made a party;[1] and it does not matter that the decree taken against him, as upon a default, recites that he "was duly served with notice and brought into court."[2] If he has assumed the payment of the mortgage, there is a double reason for making him a party.[3] If he has assumed only a portion of the mortgage debt, he is liable to a personal judgment for only that portion.[4]

1407. If the purchaser from the mortgagor has assumed the payment of the mortgage debt, and thereby made himself personally responsible to the holder of the mortgage, there is less occasion to make the mortgagor a party. As between him and the purchaser, the land itself and the purchaser are primarily responsible, and the mortgagor is a surety only. But if the mortgagee does not care to obtain a personal judgment against him, there is no occasion to make him a party to the proceedings.[5] In other words, he is not a necessary party though a proper one.[6] There is, however, no real distinction, as regards the propriety of making the mortgagor a party, between the case in which he has simply conveyed the land incumbered by the mortgage and that where the purchaser has assumed the payment of the mortgage debt. The mortgagor is just as much bound to the holder of the mortgage in one case as in the other; and whether he remains the principal debtor, or by a sale of the property another assumes his place as debtor and he becomes only a surety, he

308; Wolf *v.* Banning, 3 Minn. 202, 204. **Alabama**: Hall *v.* Huggins, 19 Ala. 200; Tutwiler *v.* Dunlap, 71 Ala. 126. **Illinois**: Ohling *v.* Luitjens, 32 Ill. 23. **Kansas**: Lenox *v.* Reed, 12 Kans. 223. **Ohio**: Childs *v.* Childs, 10 Ohio St. 339. **Texas**: Schmeltz *v.* Garey, 49 Tex. 49. **Nebraska**: Merriman *v.* Hyde, 9 Neb. 113. **Indiana**: Travellers' Ins. Co. *v.* Patten, 98 Ind. 209; Petry *v.* Ambrosher, 100 Ind. 510; Daugherty *v.* Deardorf, 107 Ind. 527. **Florida**: Jordan *v.* Sayre, 3 So. Rep. 329.

Contrary to the entire list of authorities and to sound principle, it was held in Sumner *v.* Coleman, 20 Ind. 486; and in Semple *v.* Lee, 13 Iowa, 304; Cline *v.* Inlow, 14 Ind. 419, that the owner, though a proper, is not a necessary, party defendant.

[1] Barrett *v.* Blackmar, 47 Iowa, 565.

[2] Frazier *v.* Miles, 10 Neb. 109.

[3] Bishop *v.* Douglass, 25 Wis. 696; Green *v.* Dixon, 9 Wis. 532. See this last case for a general statement of the doctrine as to parties.

[4] Logan *v.* Smith, 70 Ind. 597.

[5] Daly *v.* Burchell, 13 Abb. (N. Y.) Pr. N. S. 264, 268; Paton *v.* Murray, 6 Paige (N. Y.), 474; Van Nest *v.* Latson, 19 Barb. (N. Y.) 604; Shaw *v.* Hoadley, 8 Blackf. (Ind.) 165; Burkham *v.* Beaver, 17 Ind. 367.

[6] McArthur *v.* Franklin, 15 Ohio St. 485, 509; *S. C.* 16 Ib. 193. In Delaplaine *v.* Lewis, 19 Wis. 476, Cole, J., said: "According to the weight of modern authority, the rule seems to be settled that the mortgagor who has absolutely parted with the equity of redemption is not a *necessary*, though he is a very proper, defendant in an action to foreclose the mortgage."

continues to the same extent liable to a personal judgment for a deficiency.

1408. Intermediate purchasers who have conveyed their interest in the property should not be made parties to the bill, unless they have assumed the payment of the mortgage, and thus become personally liable for the debt, when they may be made parties for the purpose of obtaining a personal judgment against them.[1] If they have not made themselves responsible for the mortgage debt by assuming it, having no longer any interest in the land, they cannot properly be joined as defendants.[2]

Formerly it was everywhere held that a mesne purchaser who had assumed the mortgage debt, and subsequently conveyed the premises to another on like terms, was not liable to the holder of the mortgage, by reason of his assuming it, because there was no privity of contract between them; that he was liable only to his grantor, and therefore that in a suit to foreclose he could not be made a party and adjudged liable to pay any deficiency.[3] But now in several states the rule is that one who has assumed the debt is in equity directly liable for it to the holder of the mortgage.[4]

1409. Tenants in common and several owners of the equity of redemption must be joined. The mortgagee is entitled to receive the whole of his money together, if compelled to go into court at all. Therefore, in case the mortgage was made by tenants in common, he is entitled to a foreclosure of the whole estate, and cannot be compelled to receive the share of the debt due from one of them and foreclose against the other for his share.[5] Such would also be the case when two estates have been mortgaged together, and the equities have subsequently passed into different hands. Neither would he be allowed to foreclose against the owner of one estate, without making the owner of the other a party also,[6] unless there were special equities in favor of the estate exempted.

If the mortgaged estate has subsequently been divided and sold

[1] Pomeroy's Remedies and Remedial Rights, § 337; Hall *v.* Yoell, 45 Cal. 584; Lockwood *v.* Benedict, 3 Edw. (N. Y.) 72; Finch *v.* Magill (Kans.), 15 Pac. Rep. 07.

[2] Scarry *v.* Eldridge, 63 Ind. 44; *S. C.* 7 ent. L. J. 418.

[3] Lockwood *v.* Benedict, *supra.*

[4] Burr *v.* Beers, 24 N. Y. 178; Crawford *v.* Edwards, 33 Mich. 354, and cases cited; §§ 755–761.

[5] Frost *v.* Frost, 3 Sandf. (N. Y.) Ch. 188.

[6] Cholmondeley *v.* Clinton, 2 Jac. & W. 134; Palk *v.* Clinton, 12 Ves. 48, 59.

in distinct lots, all the purchasers must be made parties to make an effectual foreclosure of the whole estate.[1] If the mortgage to be foreclosed covers two distinct estates, one of which is subsequently incumbered by a second mortgage, and the other is sold to a third person, both the second mortgagee and the purchaser, as well as the original mortgagor who retains the equity of one of the estates, must be made parties to the bill; for the mortgage cannot be foreclosed upon one estate alone, unless there be special equities, if the owner of it objects. The purchaser of a part can redeem only by paying the whole debt.[2]

1410. Objection that the owner of the equity is not made a party to the bill may be taken by the mortgagor in his answer.[3] But objection that the mortgagor is not made a party defendant cannot be made by a purchaser of the premises who is a party to the suit.[4] An objection to the non-joinder of a defendant must be taken by demurrer or answer, or will be deemed to have been waived.[5] After a foreclosure sale the mortgagor cannot object to a confirmation of it on the ground that he was not made a party, and that in consequence the equity of redemption was not extinguished, and the premises brought much less than they would otherwise have brought.[6]

1411. Purchaser pendente lite. — As a general rule where the equity of redemption has been assigned or attached after the commencement of proceedings in equity to foreclose, the purchaser or attaching creditor need not be brought before the court; because he is regarded as having notice of the plaintiff's rights and his proceedings to enforce them, and can claim against him only such title and rights as the owner of the equity had at the time of the purchase or attachment.[7] In this respect an assignee in bank-

[1] Peto *v.* Hammond, 29 Beav. 91. See Ireson *v.* Denn, 2 Cox, 425.

[2] Douglass *v.* Bishop, 27 Iowa, 214.

[3] Peto *v.* Hammond, *supra;* Drury *v.* Clark, 16 How. (N. Y.) Pr. 424; Hall *v.* Nelson, 14 How. (N. Y.) Pr. 32.

[4] Williams *v.* Meeker, 29 Iowa, 292, 294.

[5] See Davis *v.* Converse, 35 Vt. 503.

[6] Cord *v.* Hirsch, 17 Wis. 403, 408.

[7] Garth *v.* Ward, 2 Atk. 174; Metcalfe *v.* Pulvertoft, 2 Ves. & B. 200, 205; Gaskell *v.* Durdin, 2 Ball & B. 167, 169; Lloyd *v.* Passingham, 16 Ves. 59, 66; Parkes *v.* White, 11 Ves. 209, 236; Stout *v.* Lye, 103 U. S. 521; McPherson *v.* Housel, 13 N. J. Eq. 299; Watt *v.* Watt, 2 Barb. (N. Y.) Ch. 371; Jackson *v.* Lose, 4 Sandf. (N. Y.) Ch. 381; Zeiter *v.* Bowman, 6 Barb. (N. Y.) 133; Griswold *v.* Miller, 15 Ib. 520; Cleveland *v.* Boerum, 23 Ib. 201; *S. C.* 27 Ib. 252; 3 Abb. Pr. 294; Lyon *v.* Sanford, 5 Conn. 545, 548; Paston *v.* Eubank, 3 J. J. Marsh. (Ky.) 42; Hull *v.* Lyon, 27 Mo. 570; Ostrom *v.* McCann, 21 How. (N. Y.) Pr. 431; Stokes *v.* Maxwell, 59 Ga. 78.

ruptcy appointed pending a foreclosure suit stands in the same position as any other grantee of the equity of redemption, and is barred by a decree against the mortgagor.[1] Provision is made in many states for the filing of a notice of the pendency of the suit in the registry or with the clerk of the court in the county where the mortgage is recorded;[2] and where the recording of such notice is required, third persons are not affected with notice unless the record is made as required.[3] But in the absence of such statutory provisions, the proceedings in court being of public record, parties are regarded as having constructive notice of the proceedings, and take subject to them. As a practical matter, if a mortgagor could, after the commencement of the suit, create new parties at his pleasure, by making new incumbrances upon the property, whose presence in court would be necessary to the foreclosure of their rights, there might be no end to the suit.[4] The doctrine of *lis pendens* does not rest upon the presumption of notice, but upon reasons of public policy; and applies where there is no possibility that there was actual notice of the pendency of the suit.[5]

The *lis pendens* commences upon the serving of the subpœna, if the bill has been actually filed.[6] The pendency of the suit creates the notice. When the cause is ended by a final decree, there is no longer any *lis pendens* by which parties can be further affected with notice.[7] Under a statute providing for the filing of a *lis pendens*, creditors obtaining judgments afterwards, even before service of the summons and complaint upon the

[1] Eyster *v.* Gaff, 91 U. S. 521; Stout *v.* Lye, 103 U. S. 66; Malone *v.* Marriott, 64 Ala. 486; Pratt *v.* Pratt, 96 Ill. 184.

[2] **South Carolina**: R. S. S. C. 1873, p. 600. **Virginia**: Code 1873, p. 1166. **West Virginia**: Code 1870, pp. 667, 668. **Connecticut**: Acts 1879, p. 389. **New York**: Code of Civil Procedure (1880), § 1670. **California**: Abadie *v.* Lobero, 36 Cal. 390.

[3] This notice is unnecessary as to all parties in interest before the court. Totten *v.* Stuyvesant, 3 Edw. (N. Y.) 500. It does not affect those having paramount rights. Curtis *v.* Hitchcock, 10 Paige (N. Y.), 399.

If, after notice has been duly recorded and one or more of the defendants served with summons in the suit, a judgment be docketed against the owner of the equity of redemption, the judgment creditor is bound by the judgment in the foreclosure suit, although at the time of the entry of his judgment the owner had not been served with summons in the foreclosure suit. Fuller *v.* Scribner, 76 N. Y. 190.

[4] Garth *v.* Ward, 2 Atk. 174; Bishop of Winchester *v.* Paine, 11 Ves. 194, 197; Brooks *v.* Vt. Cent. R. R. Co. 14 Blatchf. 463, 471.

[5] Newman *v.* Chapman, 2 Rand. (Va.) 93.

[6] Anon. 1 Vern. 318.

[7] Worsley *v.* Scarborough, 3 Atk. 392; Self *v.* Madox, 1 Vern. 459.

owner of the equity of redemption, are cut off without being made parties.[1]

If, pending the bill, the mortgagor's interest in the land is sold on execution, the plaintiff is not bound to amend his complaint so as to make the purchaser a party.[2]

It is not within the power of the mortgagor, pending a foreclosure suit, by contract with a mechanic, and without the consent of the mortgagee, to create an incumbrance upon the property which could in any wise affect the rights of the mortgagee as they might be declared by the final decree.[3]

Purchasers and creditors attaching, *pendente lite*, have no right to come in by petition and make defence in the suit.[4] They can only make themselves parties to the suit by filing a bill to protect their rights.[5]

1412. If the deed to the purchaser of the equity has not been recorded at the time of the bringing of the bill, he is nevertheless a necessary party if the plaintiff has in any way either actual or constructive notice of it;[6] but if the purchaser has not recorded his deed, and the plaintiff has no notice of it, the foreclosure is binding upon the purchaser equally as if he were made a party.[7] If the deed be recorded before the service of summons upon the mortgagor, the grantees are necessary parties, although notice of the pendency of the action had been filed before the recording of the deed.[8] Such notice becomes operative only upon the service of the summons. If the mortgage was not recorded at a time of a subsequent sale of the equity of redemption, a purchaser without notice is not a necessary party, nor even a proper one; because his rights are paramount and cannot be affected by the suit.[9]

[1] Fuller *v.* Scribner, 16 Hun (N. Y.), 130. And see Weeks *v.* Tomes, Ib. 349.

[2] Bennett *v.* Calhoun Loan & Building Asso. 9 Rich. (S. C.) Eq. 163.

[3] Hards *v.* Conn. Mut. Life Ins. Co. 8 Biss. 234; *S. C.* 8 Ins. L. J. 9; *S. C.* 6 Reporter, 420.

[4] Davis *v.* Conn. Mut. Life Ins. Co. 84 Ill. 508.

[5] People's Bank *v.* Hamilton Manuf. Co. 10 Paige (N. Y.), 481; Loomis *v.* Stuyvesant, Ib. 490.

[6] Drury *v.* Clark, 16 How. (N. Y.) Pr. 424; Ehle *v.* Brown, 31 Wis. 405; Pettibone *v.* Edwards, 15 Wis. 95. See Hodson *v.* Treat, 7 Wis. 263; Green *v.* Dixon, 9 Wis. 532.

[7] Leonard *v.* N. Y. Bay Co. 28 N. J. Eq. 192; Kipp *v.* Brandt, 49 How. (N. Y.) Pr. 358; Woods *v.* Love, 27 Mich. 308; Aldrich *v.* Stephens, 49 Cal. 676; Houghton *v.* Mariner, 7 Wis. 244; Davenport *v.* Turpin, 41 Cal. 100; Boice *v.* Michigan Mut. L. Ins. Co. (Ind.) 15 N. W. Rep. 825.

[8] Farmers' Loan & Trust Co. *v.* Dickson, 17 How. (N. Y.) Pr. 477.

[9] Cline *v.* Inlow, 14 Ind. 419; Mims *v.* Mims, 1 Humph. (Tenn.) 425.

1413. A mere occupant of the land without title should not be made a party to the bill,[1] unless by statute this be required.[2] If, however, he has any rights, these are not prejudiced by the decree,[3] and for this reason, and that the title may be quieted, an occupant or a tenant in possession, although he has no legal interest in the premises, has sometimes been regarded as a proper party to the bill.[4] A lessee for a term of years of the mortgagor, having a right to redeem, should be made a party to a suit to foreclose.[5] But occupation is notice of any rights the occupant has in the property. If, therefore, he has a valid contract of purchase, a foreclosure without making him a party will operate merely as an assignment of the mortgage.[6]

1414. Mortgagor's heirs. — If the mortgagor has died seised of the mortgaged estate, his heirs at law are indispensable parties. It is not enough to make his executor or administrator a party to it.[7] The personal representative has no title to the land, though in some states he has a temporary right of possession.

[1] Suiter *v.* Turner, 10 Iowa, 517.

[2] Buckner *v.* Sessions, 27 Ark. 219; Fletcher *v.* Hutchinson, 25 Ark. 30.

[3] Suiter *v.* Turner, *supra;* Ballard *v.* Carter (Tex.), 9 S. W. Rep. 92.

[4] Cruger *v.* Daniel, McMull. Eq. (S. C.) 157, 196.

[5] Lockhart *v.* Ward, 45 Tex. 227; Averill *v.* Taylor, 8 N. Y. 44.

[6] Martin *v.* Morris, 62 Wis. 418.

[7] Story Eq. Pl. §§ 194, 196; Farmer *v.* Curtis, 2 Sim. 466; Fell *v.* Brown, 2 Bro. Ch. 276; Palk *v.* Clinton, 12 Ves. 48, 58; Duncombe *v.* Hansley, 3 P. Wms. 333 (n.); Bradshaw *v.* Outram, 13 Ves. 234. **Illinois**: Bissell *v.* Marine Co. of Chicago, 55 Ill. 165; Ohling *v.* Luitjens, 32 Ill. 23; Lane *v.* Erskine, 13 Ill. 501; Harvey *v.* Thornton, 14 Ill. 217. **Kansas**: Britton *v.* Hunt, 9 Kans. 228. **Ohio**: Moore *v.* Starks, 1 Ohio St. 369. **Virginia**: Graham *v.* Carter, 2 Hen. & M. 6; Mayo *v.* Tomkies, 6 Munf. 520. **Tennessee**: McIver *v.* Cherry, 8 Humph. 713. **Wisconsin**: Stark *v.* Brown, 12 Wis. 572; Zægel *v.* Kuster, 51 Wis. 31. **North Carolina**: Averett *v.* Ward, Busbee Eq. 192; Isler *v.* Koonce, 83 N. C. 55; Fraser *v.* Bean, 2 S. E. Rep. 159. **Maryland**: Worthington *v.* Lee, 2 Bland, 678. **Indiana**: Muir *v.* Gibson, 8 Ind. 187; McKay *v.* Wakefield, 63 Ind. 27; Dongherty *v.* Deasdorf, 107 Ind. 527. **Missouri**: Miles *v.* Smith, 22 Mo. 502; Bollinger *v.* Chouteau, 20 Mo. 89. **Arkansas**: Kiernan *v.* Blackwell, 27 Ark. 235; Simms *v.* Richardson, 32 Ark. 297; Pillow *v.* Sentelle, 39 Ark. 61. **Alabama**: Hunt *v.* Acre, 28 Ala. 580; Erwin *v.* Ferguson, 5 Ala. 158; Jones *v.* Richardson, 5 So. Rep. 194. **Kentucky**: Shiveley *v.* Jones, 6 B. Mon. 274. **Michigan**: Abbott *v.* Godfroy, 1 Mich. 178. **Mississippi**: Byrne *v.* Taylor, 46 Miss. 95. **South Carolina**: Bryce *v.* Bowers, 11 Rich. Eq. 41; Trapier *v.* Waldo, 16 S. C. 276; Butler *v.* Williams, 3 S. E. Rep. 211; Johnson *v.* Johnson, 3 S. E. Rep. 606. **New York**: Wood *v.* Morehouse, 1 Lans. 405. **Oregon**: Renshaw *v.* Taylor, 7 Oreg. 315.

A statute forbidding an action to be brought against an executor or administrator, within one year from the date of his appointment, does not apply to a bill for foreclosure against the heir of a deceased mortgagor. Slaughter *v.* Foust, 4 Blackf. (Ind.) 379.

In **Florida** the heir is not a necessary party, but the administrator is. Merritt *v.* Daffin, 4 So. Rep. 806.

In **Georgia** the personal representative

The heirs of a mortgagor who has sold the mortgaged premises in his lifetime have no interest in the land, and therefore should not be made parties to the bill, unless the validity of the conveyance is controverted.[1] The heirs of a deceased mortgagor are not necessary parties in case the mortgagor has in his lifetime assigned all his property for the benefit of his creditors.[2] If the complainant seeks for a personal judgment or for an account, the personal representative should be joined with the heirs;[3] but if no such judgment be sought, the personal representatives should not be joined.[4] Of course such suit cannot be maintained until the expiration of the year after the issuing of letters of administration, during which time the administrator is exempt from suit.[5] If the debt is barred, or for any reason is not payable out of the personal assets, the occasion for joining the personal representative no longer exists.

The heirs of the mortgagor or other person who has died seised of the estate covered by the mortgage are necessary parties, just as the deceased mortgagor or owner would have been if the action had been brought in his lifetime, being indispensable to the rendering of any judgment of foreclosure, or for the sale of the property. The court of its own motion, even if no one who is a party to the suit makes objection that they are not joined, will order them to be brought in as defendants.[6] If the heirs are beyond the jurisdiction of the court the cause cannot be proceeded with.[7] Under a statute by which the personal representative of

of the mortgagor is a necessary party. Magruder *v.* Offutt, Dudley (Ga.), 227; Dixon *v.* Cuyler, 27 Ga. 248.

In **South Carolina**, under the former equity practice, it was said that the personal representative should be joined. Mitchell *v.* Bogan, 11 Rich. 686, 711.

In **Missouri**, since the Code of 1845, the personal representative of the mortgagor is a necessary party. Miles *v.* Smith, 22 Mo. 502; Perkins *v.* Woods, 27 Mo. 547.

[1] Medley *v.* Elliott, 62 Ill. 532; Douglas *v.* Soutter, 52 Ill. 154; Wilkins *v.* Wilkins, 4 Port. (Ala.) 245.

[2] Butler *v.* Williams (S. C.), 3 S. E. Rep. 211. In **California**, however, the heirs of the mortgagor are not necessary parties. Bayly *v.* Muehe, 65 Cal. 345.

[3] Daniel *v.* Skipwith, 2 Bro. C. C. 155; Bradshaw *v.* Outram, 13 Ves. 234; Erwin *v.* Ferguson, 5 Ala. 158; Jones *v.* Richardson, 5 So. Rep. 191; Leonard *v.* Morris, 9 Paige (N. Y.), 90; Bigelow *v.* Bush, 6 Paige (N. Y.), 345; Huston *v.* Stringham, 21 Iowa, 36; Darlington *v.* Effey, 13 Iowa, 177; Drayton *v.* Marshall, Rice (S. C.) Eq. 373; Inge *v.* Boardman, 2 Ala. 331; Belloc *v.* Rogers, 9 Cal. 123; Harwood *v.* Marye, 8 Cal. 580; Carr *v.* Caldwell, 10 Cal. 380; Butler *v.* Williams, *supra;* Hodgdon *v.* Heidman, 66 Iowa, 645.

[4] Hibernia Savings & Loan Soc. *v.* Herbert, 53 Cal. 373; *S. C.* 7 Reporter, 458.

[5] Lovering *v.* King, 97 Ind. 130.

[6] Story's Eq. Pl. § 196; Muir *v.* Gibson, 8 Ind. 187.

[7] Fell *v.* Brown, 2 Bro. C. C. 276; Farmer *v.* Curtis, 2 Sim. 466.

a deceased person succeeds to the lands as well as the personal property, for the purpose of administration, the executor or administrator becomes the necessary party in the foreclosure of a mortgage, in place of the heir.[1]

The possibility that the mortgage debt may have been paid in whole or in part is no occasion for joining the personal representative. The heir can take advantage of such payment, if any there be, and must establish the fact himself by proofs. Yet, under the statutes of several of the states, it is held that the personal representative is a proper party at least, and should be admitted as such upon his motion;[2] that he has the same right to be made a party that the mortgagor had;[3] and especially when the mortgagee seeks to charge the personal estate of the deceased, of which the administrator is the representative, on account of the inadequacy of the security.[4]

1415. Heir of purchaser. — The same rules as to making the heirs of the mortgagor parties to the foreclosure suit apply as well to the heirs of a purchaser, or of a judgment creditor,[5] but of course no personal judgment can be had against such heirs.[6]

1416. Heir of partner. — If one of two or more joint mortgagors, who are partners, dies pending a suit for foreclosure, it is not necessary to make his heirs or personal representatives parties to it, because the title vests in the surviving partners, who alone are the proper defendants.[7]

1417. Although the mortgage be of a term of years the mortgagor's heirs are alone interested, and therefore must be made parties to a bill to foreclose the mortgage.[8]

1418. Devisees. — Under the same rule a devisee of the mortgagor, whether in trust or beneficially, is a necessary party in respect to so much of the equity of redemption as has been given to him.[9] If the whole equity has been devised to him, the heir, having no interest in it, is not a proper party; but if the title of the

[1] Harwood *v.* Marye, 8 Cal. 580.

[2] Miles *v.* Smith, 22 Mo. 502; Darlington *v.* Effey, 13 Iowa, 177; Hunt *v.* Acre, 28 Ala. 580; Dixon *v.* Cuyler, 27 Ga. 248; Mitchell *v.* Bogan, 11 Rich. (S. C.) 686; Martin *v.* O'Bannon, 35 Ark. 62.

[3] Huston *v.* Stringham, 21 Iowa, 36.

[4] Darlington *v.* Effy, *supra.*

[5] Milroy *v.* Stockwell, 1 Ind. 35.

[6] Cundiff *v.* Brokaw, 7 Bradw. (Ill.) 147.

[7] Cullum *v.* Batre, 1 Ala. 126; and see Jones *v.* Parsons, 25 Cal. 100.

[8] Bradshaw *v.* Outram, 13 Ves. 234; Cholmondeley *v.* Clinton, 2 Jac. & W. 135.

[9] Coles *v.* Forrest, 10 Beav. 552; Graham *v.* Carter, 2 Hen. & M. (Va.) 6; Mayo *v.* Tomkies, 6 Munf. (Va.) 520; Chew *v.* Hyman, 7 Fed. Rep. 7.

devisee under the will be disputed by the heir, then he should be joined as well;[1] and since the probate of a will may within a limited period be impeached, a plaintiff who proceeds without joining the heirs does so at the risk of their afterwards proving to be the real parties in interest.[2] A discretionary power of sale for reinvestment, given to an executor during the minority of a devisee, does not vest the executor with the fee so as to make him a necessary party to the suit.[3] An executor with such a power cannot bind a devisee not made a party to the suit by a ratification of the foreclosure.[4] If the mortgagor by his will charges the equity of redemption with the payment of an annuity, the annuitant should be made a party.[5]

1419. Legatees. — When legacies are made a special charge upon the mortgaged estate the legatees should be made parties.[6] But they are not necessary parties when the legacies are not a charge upon the mortgaged premises, or upon the real estate generally.[7]

A guardian of minor heirs need not be joined with them as a defendant in the suit.[8]

1420. Mortgagor's wife. — It is usual to make the wife who has joined in the execution of the mortgage a party. But no objection can be taken by the defendant that she is not joined; the only consequence is that if her right of dower becomes fixed and absolute, she may then redeem.[9] It is questioned in some cases whether it is necessary to join the wife in order to cut off her inchoate right of dower,[10] on the ground that this right is not any real interest in the land. But generally this inchoate right of dower is regarded as a right in the land created for her benefit, which attaches as soon as her husband is seised of it, although it

[1] Macclesfield *v.* Fitton, 1 Vern. 168; Lewis *v.* Nangle, 2 Ves. Sen. 430; *S. C.* Ambl. 150.

[2] Hunt *v.* Acre, 28 Ala. 580.

[3] Chew *v.* Hyman, 7 Fed. Rep. 7.

[4] Chew *v.* Hyman, *supra.*

[5] Hunt *v.* Fownes, 9 Ves. 70.

[6] Batchelor *v.* Middleton, 6 Hare, 75, 78; M'Gown *v.* Yerks, 6 Johns. (N. Y) Ch. 450.

[7] Hebron Society *v.* Schoen, 60 How. (N. Y.) Pr. 185.

[8] Alexander *v.* Frary, 9 Ind. 481.

[9] Powell *v.* Ross, 4 Cal. 197; Rissel *v.* Eaton, 64 Ind. 248.

[10] In Denton *v.* Nanny, 8 Barb. (N. Y.) 618, Brown, J., said: "I find it nowhere expressly adjudged that a wife is a necessary party to a bill of foreclosure in order to extinguish her inchoate right of dower." Bell *v.* Mayor of N. Y. 10 Paige (N. Y.), 49; Eslava *v.* Le Pretre, 21 Ala. 504; Cary *v.* Wheeler, 14 Wis. 281: but see Foster *v.* Hickox, 38 Wis. 408; Thornton *v.* Pigg, 24 Mo. 249; Riddick *v.* Walsh, 15 Mo. 519, 538; Powell *v.* Ross, *supra.* This case, however, is overruled by later cases in this state. See *infra.*

is at the time and until his death only a contingent or possible one. This inchoate right is therefore as much entitled to protection as the right, when it is absolute. The want of harmony between the decisions in this matter is in large part to be accounted for by the statutes of several states which have radically changed the common law of dower. In all those states in which the common law doctrine remains unchanged, when the wife of a mortgagor has joined in the execution of a mortgage, the rule is general that she should be joined as a party when it is desired to bar her rights by the decree of foreclosure or sale.[1]

The wife having no separate estate in the property at the time of the foreclosure, but only a possibility of dower upon the death of the husband leaving her surviving, some authorities hold that when she is made a party to the foreclosure suit a personal service of the summons upon her is not necessary; that it is sufficient to serve it upon the husband only; and that he is bound to appear for her, and if he does not she may be defaulted as if personally served.[2] Her right is regarded as a mere incident to her husband's title. It would seem, however, that process should issue against her. Though she be made a party to the suit, a

[1] **Wisconsin**: Foster *v.* Hickox, 38 Wis. 408. **Iowa**: Moomey *v.* Maas, 22 Iowa, 380; Chase *v.* Abbott, 20 Iowa, 154; Burnap *v.* Cook, 16 Iowa, 149. **California**: Sargent *v.* Wilson, 5 Cal. 504; Revalk *v.* Kraemer, 8 Cal. 66; Kohner *v.* Ashenauer, 17 Cal. 578; Anthony *v.* Nye, 30 Cal. 401; Marks *v.* Marsh, 9 Cal. 96; Burton *v.* Lies, 21 Cal. 87. **Texas**: Tadlock *v.* Eccles, 20 Tex. 782. **Michigan**: Wisner *v.* Farnham, 2 Mich. 472. **Illinois**: Wright *v.* Langley, 36 Ill. 381; Leonard *v.* Villars, 23 Ill. 377. **Maryland**: Johns *v.* Reardon, 3 Md. Ch. 57. **Mississippi**: Denniston *v.* Potts, 19 Miss. 36; Byrne *v.* Taylor, 46 Miss. 95. **Indiana**: Watt *v.* Alvod, 25 Ind. 533; Martin *v.* Noble, 29 Ind. 216; Chambers *v.* Nicholson, 30 Ind. 349. **New York**: Mills *v.* Van Voorhies, 28 Barb. 125; *S. C.* 20 N. Y. 412; Merchants' Bank *v.* Thomson, 55 N. Y. 7, 11. **North Carolina**: Nimrock *v.* Scanlan, 87 N. C. 119.

This matter is fully discussed in McArthur *v.* Franklin, 15 Ohio St. 485; *S. C.* 6 Ohio St. 193.

[2] **New York**: Foote *v.* Lathrop, 53 Barb. 183; affirmed in 41 N. Y. 358; Watson *v.* Church, 3 Hun, 80; Eckerson *v.* Vollmer, 11 How. Pr. 42; Lathrop *v.* Heacock, 4 Lans. 1; White *v.* Coulter, 1 Hun, 357, 359. In Ferguson *v.* Smith, 2 Johns. Ch. 139, Chancellor Kent gives us the reason for the rule that service of a subpœna against husband and wife is good if made on the husband alone: that the husband and wife are one person in law; and the husband is bound to answer for both. Perhaps this reason was better formerly than now. As regards the matter of service upon the wife in a foreclosure suit to bar her right of dower, the fact that this is no existing claim, and is an interest resulting from the marital relations, seems to be the ground taken in the recent decisions for the rule that service upon the husband alone is good.

Under the present Code of Procedure of **New York**, the wife of the owner of the equity of redemption may appear and defend by her own attorney, as though she were single. Janinski *v.* Heidelberg, 21 Hun, 439.

summons issued against, and served on the husband alone, does not, according to most authorities, bind her in any way, or even authorize the husband to appear and act for her; and the doctrine stated above seems to be generally repudiated.[1]

If the mortgagor dies before foreclosure, or pending a foreclosure suit, his widow should be made a defendant.[2]

1421. If the wife did not join her husband in his mortgage in release of her dower, she should still be made a party to the bill if there is a defence to the claim, either by reason of a subsequent release, or because the mortgage was given to secure the payment of purchase money, and is not subject to dower.[3] In such cases the right is subordinate to the mortgage, and is barred if she be made a party. There are cases in conflict with this rule, proceeding upon the theory that the wife in such case has no interest in the land, or any equity of redemption, and is therefore barred by the decree, although not made a party.[4] If the claim be a paramount one, and in no way subject to the mortgage, it cannot then be barred by the decree, and she should not be made a party to the suit.[5] But if she has not joined in the mortgage, and there is no defence to her claim, she is not a proper party to the bill, as her rights would not be affected if she were made a party.[6]

1422. In those states where the common law doctrine of dower is changed, and husband and wife are made wholly independent of each other as to their rights of property, the wife is not a necessary party.[7] If she has no interest and makes no claim of interest, she should not be made a party.[8] The wife of the mortgagor who has released her interest in the mortgage, and then joined her husband in conveying the equity of redemption to

[1] McArthur *v.* Franklin, 15 Ohio St. 485; *S. C.* 16 Ohio St. 193; Union Bank at Massillon *v.* Bell, 14 Ohio St. 200. See Denton *v.* Nanny, 8 Barb. (N. Y.) 618, 624; Mills *v.* Van Voorhies, 20 N. Y. 412, 415.

[2] Zægel *v.* Kuster, 51 Wis. 31.

[3] Mills *v.* Van Voorhies, *supra*, reversing *S. C.* 23 Barb. (N. Y.) 125; Wheeler *v.* Morris, 2 Bosw. (N. Y.) 524; Heth *v.* Cocke, 1 Rand. (Va.) 344; Foster *v.* Hickox, 38 Wis. 408.

[4] Fletcher *v.* Holmes, 32 Ind. 497; Etheridge *v.* Vernoy, 71 N. C. 184–186.

[5] Brackett *v.* Baum, 50 N. Y. 8; Merchants' Bank *v.* Thomson, 55 N. Y. 7; Kittle *v.* Van Dyck, 1 Sandf. (N. Y.) Ch. 76; Bell *v.* Mayor of New York, 10 Paige (N. Y.), 49; Mills *v.* Van Voorhies, *supra*; Mavrich *v.* Grier, 3 Nev. 52.

[6] Baker *v.* Scott, 62 Ill. 86; Sheldon *v.* Patterson, 55 Ill. 507; Merchants' Bank *v.* Thomson, 55 N. Y. 7; *S. C.* Alb. L. J. 426; Lewis *v.* Smith, 9 N. Y. 502; *S. C.* 11 Barb. (N. Y.) 152; Moomey *v.* Maas, 22 Iowa, 380.

[7] Miles *v.* Smith, 22 Mo. 502; Thornton *v.* Pigg, 24 Mo. 249; Powell *v.* Ross, 4 Cal. 197.

[8] Stevens *v.* Campbell, 21 Ind. 471.

a purchaser, can have no possible interest in the land, and therefore is not a proper defendant. Of course, if the mortgaged estate be the separate property of a married woman, she is then owner of the equity of redemption, and as such is a necessary party.[1]

The defendant cannot take the objection that his wife, who joined in the execution of the mortgage, is not joined as a party.[2]

1423. Where homestead is claimed. — If the premises mortgaged are subject to a homestead right, the wife should be made a party.[3] If, however, the mortgage was given to secure the purchase money and the wife did not join in it, she is not a necessary party by reason of the homestead right; such a mortgage is valid and not subject to the homestead right.[4] A wife who has joined in a mortgage releasing her homestead rights is not a necessary party to a foreclosure suit by reason of such homestead.[5] If for any reason the mortgage is paramount to the right of homestead, the mortgagor's wife is not a necessary though a proper party by reason of such right.[6] When the mortgagor has become a bankrupt, and in his schedule claims the mortgaged premises to be his homestead, he must be made a party defendant in proceedings to foreclose the mortgage. It is not sufficient to make the assignee in bankruptcy a party unless the mortgagor had executed the mortgage in such a form as to effectually cut off his right of homestead.[7]

1424. Husband. — In an action to foreclose a mortgage executed by husband and wife on the separate estate of the wife, the husband is a proper co-defendant, both by reason of his interest

[1] Hill *v.* Edmunds, 5 De G. & S. 603.

[2] Powell *v.* Ross, 4 Cal. 197.

[3] Sargent *v.* Wilson, 5 Cal. 504; Revalk *v.* Kraemer, 8 Cal. 66; Moss *v.* Warner, 10 Cal. 296; Mabury *v.* Ruiz, 58 Cal. 11; Hefner *v.* Urton (Cal.), 12 Pac. Rep. 486.

In **Kentucky** a statute provides that no mortgage or release of a homestead exemption shall be valid unless subscribed by both husband and wife; G. S. ch. 38, art. 13, § 13; and it is held that where the wife did not join in the mortgage, although, on foreclosure, the homestead is sold subject to the wife's homestead and dower rights, the sale does not even pass the husband's interest. Atkinson *v.* Gowdy, 8 S. W. Rep. 698; Tong *v.* Eifort, 80 Ky. 152; Thorn *v.* Darlington, 6 Bush, 448; Wing *v.* Hayden, 10 Bush, 276.

[4] Amphlett *v.* Hibbard, 29 Mich. 298. Christiancy, J., said: "We see no substantial ground for requiring her to be made a party, nor can we see any such substantial benefit to arise from such a requirement as would counterbalance the embarrassments which would arise from such a rule."

[5] Townsend Sav. Bank *v.* Epping, 3 Woods, 390.

[6] Connecticut Mut. Life Ins. Co. *v.* Jones, 1 McCrary, 388.

[7] Dendel *v.* Sutton, 20 Fed. Rep. 787.

in the land, and in some cases by his personal liability on the note.[1] But in those states where the interests of husband and wife are made completely separate and independent as to the property they respectively own, there is no good reason for joining the husband in such case unless he has become personally responsible for the debt, and a personal judgment is sought against him;[2] and of course when not a necessary party himself, his heirs or personal representatives are not necessary parties to a suit brought after his death.[3]

Upon the decease of the husband his personal representative may be made a party to such action; and he is a necessary party if the debt secured was the debt of the husband.[4]

1425. All subsequent mortgagees, as well as other incumbrancers, should be made parties to the action, or they may afterwards redeem; but they are not necessary parties.[5] The assignees of subsequent mortgagees are parties as necessary as the original mortgagees.[6] If the entire interest is assigned, the mortgagee is

[1] Wolf *v.* Banning, 3 Minn. 202; Mavrich *v.* Grier, 3 Nev. 52; Andrews *v.* Swarton, 81 Ind. 474.

[2] Building Loan & Savings Asso. *v.* Camman, 11 N. J. Eq. (3 Stockt.) 382; Thornton *v.* Pigg, 24 Mo. 249; Riddick *v.* Walsh, 15 Mo. 519, 538.

[3] Building Loan & Savings Asso. *v.* Camman, *supra.*

[4] Mebane *v.* Mebane, 80 N. C. 34.

[5] **New York**: Peabody *v.* Roberts, 47 Barb. 91; Franklyn *v.* Hayward, 61 How. Pr. 43; Arnot *v.* Post, 6 Hill, 65; Waller *v.* Harris, 7 Paige, 167; Vanderkemp. *v.* Shelton, 11 Paige, 28. **California**: Carpentier *v.* Brenham, 40 Cal. 221; *S. C.* 50 Ib. 549; Hayward *v.* Stearns, 39 Cal. 58, 60; Davenport *v.* Turpin, 43 Cal. 597, 601; Carpentier *v.* Williamson, 25 Cal. 161; Schadt *v.* Heppe, 45 Cal. 433, 437. **Iowa**: Gower *v.* Winchester, 33 Iowa, 303; Newcomb *v.* Dewey, 27 Iowa, 381; Street *v.* Beal, 16 Iowa, 68; Chase *v.* Abbott, 20 Iowa, 154; Heimstreet *v.* Winnie, 10 Iowa, 430; Anson *v.* Anson, 20 Iowa, 55; Johnson *v.* Harmon, 19 Iowa, 56; Donnelly *v.* Rusch, 15 Iowa, 99; Semple *v.* Lee, 13 Iowa, 304; Ten Eyck *v.* Casad, 15 Iowa, 524; Crow *v.* Vance, 4 Iowa, 434; Veach *v.* Schaup, 3 Iowa, 194; Bates *v.* Ruddick, 2 Iowa, 423. See this last case for a full discussion of the point. **Illinois**: Kenyon *v.* Shreck, 52 Ill. 382; Augustine *v.* Doud, 1 Bradw. 588. **Indiana**: Pattison *v.* Shaw, 6 Ind. 377; Hosford *v.* Johnson, 74 Ind. 479; Mack *v.* Grover, 12 Ind. 254; Meredith *v.* Lackey, 16 Ind. 1; Murdock *v.* Ford, 17 Ind. 52; McKernan *v.* Neff, 43 Ind. 503. Ætna L. Ins. Co. *v.* Finch, 84 Ind. 301; Buchanan *v.* Berkshire L. Ins. Co. 96 Ind. 510. **Maryland**: Leonard *v.* Groome, 47 Md. 499; Johnson *v.* Hambleton, 52 Md. 378; Harris *v.* Hooper, 50 Md. 537. **Kentucky**: Cooper *v.* Martin, 1 Dana, 23, 25; Roney *v.* Bell, 9 Ib. 3. **Alabama**: Wiley *v.* Ewing, 47 Ala. 418. **Mississippi**: Brown *v.* Nevitt, 27 Miss. 801. **New Jersey**: Vanderveer *v.* Holcomb 17 N. J. Eq. 87; Atwater *v.* West, 28 N. J. Eq. 361; Gould *v.* Wheeler, 28 N. J. Eq. 541. **Texas**: Webb. *v.* Maxan, 11 Tex. 678. **Minnesota**: Rogers *v.* Holyoke, 14 Minn. 22. In **Tennessee** it is held that subsequent mortgagees are bound, though not made parties, if there was no collusion between the parties to the bill, or other special ground of equity. Rowan *v.* Mercer, 10 Humph. 359.

[6] Swift *v.* Edson, 5 Conn. 531; Vanderkemp *v.* Shelton, *supra; S. C.* Clarke (N. Y.), 351.

no longer a proper party, but the assignee becomes such in his place.[1] The assignee in bankruptcy of the subsequent mortgagee must be made a party to the suit, or he will have the right to redeem.[2]

If the plaintiff be himself the owner of a second mortgage upon the same property, he should set out this fact in his complaint. He cannot, without such reference in the complaint or exception in the judgment, require bids to be made subject to his second mortgage.[3]

A junior mortgagee whose mortgage has never been recorded, and of which the senior mortgagee has no notice, need not be made a party to the latter's foreclosure suit.[4]

An assignee of a mechanic's lien is a necessary party to a suit to foreclose a mortgage given after the lien commenced, although the mortgagee had no knowledge of its existence, and the mortgage was recorded before the commencement of statutory proceedings to enforce the lien.[5]

1426. A mortgagee who has assigned the mortgage, although he has not indorsed the note, is not *primâ facie* a necessary party;[6] nor is he although the assignment shows that he assigned the mortgage as collateral security.[7] But when he has assigned the mortgage merely as collateral security, it is desirable, at least, that he should be made a party; because, if not assigned for its full value, he has still an interest in it; and he may in fact be able to show that the debt for which he has assigned the mortgage has been paid, and that he is really the only one beneficially interested in the security.[8] The better practice, therefore, is to make the assignor of the mortgage a party, whenever it appears either from the assignment or otherwise that he has still an interest in the security.[9]

Except by reason of his personal liability, a mortgagee who has assigned the mortgage absolutely, and indorsed the note, is

[1] Pullen *v.* Heron Min. Co. 71 N. C. 567.

[2] Avery *v.* Ryerson, 34 Mich. 362.

[3] Homœpathic Mut. L. Ins. Co. *v.* Sixbury, 17 Hun (N. Y.), 424.

[4] Henderson *v.* Grammar, 66 Cal. 332; Reel *v.* Wilson 64 Iowa. 13.

[5] Atkins *v.* Volmer, 21 Fed. Rep. 697.

[6] Walker *v.* Bank of Mobile, 6 Ala. 452; Harwell *v.* Lehman, 72 Ala. 344; Western Reserve Bank *v.* Potter, Clarke (N. Y.), 432.

[7] Woodruff *v.* Depue, 14 N. J. Eq. 168.

[8] Bard *v.* Poole, 12 N. Y. 495; Dalton *v.* Smith, 86 N. Y. 176.

[9] § 1375; Whitney *v.* M'Kinney, 7 Johns. (N. Y.) Ch. 144; Kittle *v.* Van Dyck, 1 Sandf. (N. Y.) Ch. 76; Bloomer *v.* Sturges, 58 N. Y. 168, 175; Ackerson *v.* Lodi Branch R. R. Co. 28 N. J. Eq. 542.

not a proper defendant in a suit to foreclose the mortgage. The action should be against the mortgagor without joining him, for, though he is liable to the holder of the mortgage as indorser, and might be joined with the maker in a suit on the note, he has nothing to do with the mortgaged property, and cannot be a party to the foreclosure suit.[1] But where a personal judgment may be had against any one liable for the mortgage debt, such mortgagee could be joined for that purpose.[2]

1427. Assignee of note. — In those states where the transfer of the note or bond secured by the mortgage is held to carry with it the mortgage security, the holder of the note, though he has no formal assignment of the mortgage, should be made a party to the bill;[3] and a sale made without joining him does not bar his right to redeem,[4] or prevent his maintaining an action against the purchaser to foreclose his mortgage.[5] In accordance with this principle, after a mortgage has been assigned by an indorsement upon it, without an indorsement of the note or bond secured by it, the assignor remains the real holder of the mortgage, and is a necessary party.[6] In several states there are statutes requiring the assignor to be made a party "when the thing in action is not assignable by indorsement," or when it is not a negotiable instrument. Under these provisions the holder of a mortgage note transferred by indorsement, or by delivery when payable to bearer, may be made a party without the assignor;[7] but if the mortgage debt be evidenced by a bond or non-negotiable note, which is transferred by delivery, although the mortgage is formally assigned, the assignor is a necessary party.[8] A mortgagee who has assigned a negotiable note without a formal assignment of the mortgage is not a necessary party.[9]

If the mortgage secures several notes which have been assigned and are held by different persons, to a suit by one holder to enforce the mortgage the holders of the other notes should be made parties.[10] But in Iowa such a transferee, though not made a

[1] Sands *v.* Wood, 1 Iowa, 263.

[2] Nichols *v.* Randall, 5 Minn. 304, 308; Andrews *v.* Gillespie, 47 N. Y. 487; Christie *v.* Herrick, 1 Barb. (N. Y.) Ch. 254; Ward *v.* Han Bokkelen, 2 Paige (N. Y.), 289; and see Delaware Bank *v.* Jarvis, 20 N. Y. 226.

[3] Burton *v.* Baxter, 7 Blackf. (Ind.) 297; Dewing *v.* Scribner, 53 Vt. 1.

[4] Holliger *v.* Bates, 43 Ohio St. 437.

[5] Holliger *v.* Bates, *supra.*

[6] Holdridge *v.* Sweet, 23 Ind. 118; Bell *v.* Shrock, 2 B. Mon. (Ky.) 29.

[7] Gower *v.* Howe, 20 Ind. 396.

[8] Holdridge *v.* Sweet, *supra;* French *v.* Turner, 15 Ind. 59.

[9] Wilson *v.* Spring, 64 Ill. 14.

[10] Delespine *v.* Campbell, 45 Tex. 628.

party, is affected by a foreclosure decree obtained by the holder of an earlier maturing note secured by the same mortgage, and his only remedy is to make statutory redemption from the foreclosure sale.[1]

If the assignment has not been recorded, the assignee need not be made a party to the suit, unless the plaintiff has notice of the assignment before he takes his decree.[2]

1428. Upon the death of a junior mortgagee his personal representative is a proper party to a bill by the prior mortgagee to foreclose. His heir has no interest in the mortgage.[3] If such mortgagee was a non-resident of the state, the plaintiff may take out administration for the purposes of the foreclosure suit.[4]

1429. After default. — Incumbrancers who have been made parties to the bill, and suffered default, cannot complain that one of them was not duly served with process, when afterwards it appears that the property has sold for a sum less than the amount due upon the mortgage. The defendant not served can alone take advantage of the want of service.[5]

1430. After payment. — A junior mortgagee, after receiving full satisfaction for his debt, though not made a party to a foreclosure of a prior mortgage, has no right of redemption which he can exercise himself or transfer to another; and the rule is the same in case his mortgage is in the form of an absolute conveyance, and he has upon payment conveyed the premises at the request of the mortgagor to a third party. He cannot invest the mortgagor or a third party with a right to redeem when he himself has ceased to have that right.[6]

1431. The only right of a junior mortgagee, who has not been made a party to the foreclosure of a prior mortgage, is to redeem the property from that mortgage. It does not matter that on the sale of the property under the foreclosure of the prior mortgage there was a surplus which, with the consent of the mortgagor, was paid to a third mortgagee who was made a party to the suit, and the property subsequently depreciated so that

[1] Hensley *v.* Whiffin, 54 Iowa, 555; and see Kemerer *v.* Bournes, 53 Iowa, 172.

[2] Dickerman *v.* Lust, 66 Iowa, 444.

[3] Whitla *v.* Halliday, 4 Dr. & War. 267; Shaw *v.* McNish, 1 Barb. (N. Y.) Ch. 326; Lockman *v.* Reilly, 95 N. Y. 64; Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257; Plummer *v.* Doughty, 58 Me. 341; Lockman *v.* Reilly, 10 Abb. N. C. 351; *S. C.* 95 N. Y. 64.

[4] Lothrop's Case, 33 N. J. Eq. 246.

[5] Montgomery *v.* Tutt, 11 Cal. 307.

[6] McHenry *v.* Cooper, 27 Iowa, 137.

there was no value above the first mortgage. The middle mortgagee has no claim upon the surplus. Whether the property has increased or depreciated in value since the sale under the first mortgage does not affect his right to redeem, which is the only right he has in the matter.[1]

1431 *a*. A joint and several maker of the note secured should be joined as a party, although the mortgage was executed by another. The judgment should settle the obligations of all the principal debtors. This is especially the case where the mortgage has been assigned and the defence to the note could only be enforced by a joint cross-action for damages.[2]

1432. A guarantor of the mortgage debt is not a proper party to the foreclosure suit, because he is not liable to the holder of the mortgage until the remedy against the mortgagor and the property mortgaged is first exhausted.[3] But where the court has power to decree the payment of any deficiency there may be after the sale of the property, as well against a third person as against the mortgagor, then a mortgagee who has assigned his mortgage and guaranteed the payment of it, or any other person who has become a guarantor or surety of the debt, is a proper[4] though not a necessary[5] party to a suit to foreclose the mortgage. One who has guaranteed that the mortgage debt is collectible is in this way a proper party.[6] But in all cases when the collateral undertaking is strictly one of guaranty, the judgment should provide that execution should not issue against the guarantor until an execution against the persons primarily liable has been returned unsatisfied.[7] Upon a guaranty made by the holder of a mortgage upon assigning it, that the mortgaged premises are sufficient to pay the debt, and that the mortgage is collectible, the guarantor is not liable unless the assignee makes a diligent foreclosure of the mortgage. Any unreasonable delay, such as the

[1] McKernan *v.* Neff, 43 Ind. 503; Spurgin *v.* Adamson, 62 Iowa, 661.

[2] Dederick *v.* Barber, 44 Mich. 19.

[3] Newton *v.* Egmont, 4 Sim. 574; Gedye *v.* Matson, 25 Beav. 310; Joy *v.* Jackson & Mich. Plank Road Co. 11 Mich. 155; Borden *v.* Gilbert, 13 Wis. 670.

[4] § 1710; Jarman *v.* Wiswall, 24 N. J. Eq. 267; Bristol *v.* Morgan, 3 Edw. (N. Y.) Ch. 142; Rushmore *v.* Miller, 4 Ib. 84; Jones *v.* Stienbergh, 1 Barb. (N. Y.) Ch. 250; Luce *v.* Hinds, Clarke (N. Y.), 453; Fond du Lac Harrow Co. *v.* Haskins, 51 Wis. 135; Thorne *v.* Newby, 59 How. (N. Y.) Pr. 120.

[5] Cases above cited, and Stiger *v.* Mahone, 24 N. J. Eq. 426, 430.

[6] Leonard *v.* Morris, 9 Paige (N. Y.), 90; Curtis *v.* Tyler, Ib. 432.

[7] Leonard *v.* Morris, *supra*.

lapse of nine months after the maturity of an instalment of the mortgage, to foreclose it will discharge the guarantor.[1]

A guarantor of "collection" is not generally a proper party,[2] because no obligation arises on the part of such guarantor until there is found to be a deficiency after foreclosure;[3] nor is a surety for the provision by the mortgagor of a sinking fund to be invested for the payment of the mortgage.[4]

A state which has indorsed the bonds of a railroad company secured by a statutory mortgage, is not considered a necessary party to a suit to foreclose the mortgage.[5]

1433. Collateral to guaranty. — And the courts have gone still further in this direction, and have held that the maker of a collateral obligation taken by the guarantor as further security for the amount due on the mortgage is a proper party to the suit, because the holder of the mortgage is entitled in equity to the benefit of the collateral undertaking, and to have a decree against him if the proceeds of the sale are insufficient.[6]

The heirs and devisees of a deceased guarantor cannot, however, be made parties to the suit for the purpose of reaching real estate that has come to them from the deceased to satisfy an anticipated deficiency in the mortgaged property to meet the debt.[7]

1434. Indorser of note. — Except for the purpose of obtaining a personal judgment against one who is merely an assignor or indorser of a promissory note secured by the mortgage, he is neither a necessary nor proper party to an action against the maker to foreclose the mortgage. The indorser is concluded by the amount for which the property is sold under the decree of foreclosure, and cannot afterwards object in a suit against himself on his indorsement that he was not a party to the foreclosure suit.[8] And so also the maker of a note which is secured by a mortgage executed by another is not a necessary party, and, if no

[1] Northern Ins. Co. of N. Y. *v.* Wright, 13 Hun (N. Y.), 166; *S. C.* 19 Alb. L. J. 378; Craig *v.* Parkis, 40 N. Y. 181.

[2] Baxter *v.* Smack, 17 How. (N. Y.) Pr. 183.

[3] Johnson *v.* Shepard, 35 Mich. 115.

[4] Joy *v.* Jackson & Mich. Plank Road Co. 11 Mich. 155.

[5] Young *v.* Montgomery & Eufaula R. R. Co. 2 Woods, 606; *S. C.* 3 Am. L. T. R. (N. S.) 9.

[6] Curtis *v.* Tyler, 9 Paige (N. Y.), 432.

[7] Leonard *v.* Morris, 9 Paige (N. Y.), 90.

[8] Markel *v.* Evans, 47 Ind. 326. In California it is held that it is proper under the Practice Act to join the mortgagor and indorser as defendants. Eastman *v.* Turman, 24 Cal. 379.

personal claim is made against him, is not a proper party to the suit to foreclose.[1]

If a surety of the mortgage debt is made a party defendant, and dies *pendente lite*, the action may proceed without making his representative a party.[2]

1435. Joint mortgagees. — In a bill to foreclose by one of two joint mortgagees, the other mortgagee must be made a party, either by joining in the bill, or, if he declines to do this, as a respondent.[3] But where a mortgage secures several notes falling due at different times, in a suit by the holder of one of the notes to foreclose the mortgage, the holder of a note subsequently falling due is not a necessary party; but if not made a party, of course his rights are unaffected by the decree and sale.[4] The mortgagee not made a party may subsequently file his complaint to foreclose, and may make the debtor and all the other mortgagees parties, and may contest the claims of the latter.[5] If there be two mortgages, one collateral to the other, both mortgagors should be made parties to the bill to foreclose, for the mortgagor in the collateral mortgage has a right to redeem, and it is his interest that his property should be called upon to satisfy as small a deficiency as possible.[6]

1436. Judgment creditors. — A subsequent judgment creditor of the mortgagor having a lien upon the property should be made a party to the proceedings, otherwise he may redeem after the sale, but he is not a necessary defendant.[7] He cannot, however, have the sale set aside by petition in the foreclosure suit.[8] There has been some question as to what acts are necessary to constitute this lien, and when it accrues. A judgment is gener-

[1] Kearsing *v.* Kilian, 18 Cal. 491; and see Deland *v.* Mershon, 7 Iowa, 70; Wilkerson *v.* Daniels, 1 Greene (Iowa), 179; De Cottes *v.* Jeffers, 7 Fla. 284. See, however, Davis *v.* Converse, 35 Vt. 503, where the principal was held a proper party, by reason of the accounting before the master, and the court for that reason might compel his being brought in if the objection was made in season.

[2] Daniels *v.* Moses, 12 S. C. 130.

[3] Hopkins *v.* Ward, 12 B. Mon. (Ky.) 185. As to simultaneous mortgages, see Cain *v.* Hanna, 63 Ind. 408.

[4] Harris *v.* Harlan, 14 Ind. 439; Murdock *v.* Ford, 17 Ind. 52.

[5] Goodall *v.* Mopley, 45 Ind. 355.

[6] Stokes *v.* Clendon, 3 Swans. 150.

[7] Sharpe *v.* Scarborough, 4 Ves. 538; Stonehewer *v.* Thompson, 2 Atk. 440; Blagrave *v.* Clunn, 2 Vern. 576; Henry *v.* Smith, 2 Dr. & War. 381, 390; Adams *v.* Paynter, 1 Coll. 530; Winebrener *v.* Johnson, 7 Abb. N. S. (N. Y.) Pr. 202; Brainard *v.* Cooper, 10 N. Y. 356; Proctor *v.* Baker, 15 Ind. 178; Muir *v.* Gibson, 8 Ind. 187; Gaines *v.* Walker, 16 Ind. 361; Harris *v.* Hooper, 50 Md. 537; De Lashmutt *v.* Sellwood, 10 Oreg. 319; Moon *v.* Wellford (Va.), 4 S. E. Rep. 527.

[8] Pratt *v.* Frear, 13 Wis. 462.

ally a lien from the time it is docketed, and no execution or sale is necessary to establish a title to redeem. The judgment itself carries with it the right of redemption, and therefore makes the creditor a necessary party.[1] In case the mortgage be for purchase money, no lien by subsequent judgment would attach, and therefore the creditor is without remedy whether made a party or not.[2] And so also if the judgment creditor has not perfected the proceedings under his judgment, so as to have made it a charge upon the debtor's land, he is not a proper party.[3] A creditor of the mortgagor who has attached the equity of redemption should be made a party;[4] as also one who has levied an execution upon it, though the time allowed the debtor to redeem has not expired.[5]

A judgment rendered against a person prior to his purchase of land is not generally a lien upon it; and even a mortgage given at the time of the purchase by him for the purchase money would not be affected by it; and upon the foreclosure of such a mortgage, though the judgment creditor be not made a party to the suit, if the property sell for less than the mortgage debt, the purchaser obtains a valid and irredeemable title.[6]

A simple contract creditor having no lien upon the property is not a proper party to a foreclosure suit.[7]

A judgment creditor whose claim accrued while the mortgaged premises were subject to a homestead exemption has no lien thereon, and is therefore not a necessary party to proceedings to foreclose the mortgage begun while the homestead right exists.[8]

1437. Judgment after decree. — A creditor having a judgment rendered before the sale, but subsequent to the decree, may redeem at any time before the sale by virtue of his lien. But after the sale the right is as effectually barred as if the creditor had been made a party to the proceeding. Neither has such creditor any right to come in by petition, and make defence to the suit.[9]

[1] Brainard *v.* Cooper, 10 N. Y. 356.

[2] Person *v.* Merrick, 5 Wis. 231.

[3] Cork *v.* Russell, L. R. 13 Eq. 210.

[4] Dickinson *v.* Lamoille Co. Nat. Bank, 12 Fed. Rep. 747; Lyon *v.* Sanford, 5 Conn. 544. See, also, Carter *v.* Champion, 8 Conn. 549. *Contra*, see Nichols *v.* Holgate, 2 Aik. (Vt.) 138.

[5] Bullard *v.* Leach, 27 Vt. 491.

[6] De Saussure *v.* Bollmann, 7 S. C. 329.

[7] Gardner *v.* Lansing, 28 Hun (N. Y.), 413; McMurtry *v.* Montgomery Masonic Temple Co. (Ky.) 5 S. W. Rep. 570.

[8] Sutherland *v.* Tyner (Iowa), 33 N. W. Rep. 645. Neither is such judgment creditor entitled to redeem the homestead from the mortgage sale. Sutherland *v.* Tyner, *supra*; Grant *v.* Parsons, 67 Iowa, 31; 24 N. W. Rep. 578.

[9] People's Bank *v.* Hamilton Manuf. Co. 10 Paige (N. Y.), 481.

A creditor holding a judgment rendered prior to the mortgage is not a proper party to a suit to foreclose it.[1]

1438. Bankrupt. — If the owner of the equity of redemption becomes bankrupt, and his estate is assigned under the law, he should not generally be made a party, for he has no longer any right of redemption in it, but his assignee should be made a party in his place.[2] If the bankruptcy occur after the foreclosure suit has been commenced, he should suggest his bankruptcy and move for a continuance of the suit, to await the termination of the proceedings in bankruptcy, when he may plead his discharge if any judgment is sought on his personal liability. The assignee may, however, appear and allow the proceedings to go on, so far as the foreclosure and sale of the property is concerned. But unless the proceedings are continued in the state court upon motion, or are restrained by the bankruptcy court, they may proceed to judgment and sale.[3]

1438 *a*. A receiver, appointed by the court, of the property of a corporation, partnership, or individual, upon the foreclosure of a mortgage upon the property, should be made a party defendant in his official capacity; but if made a party in his individual capacity, he cannot stand by without objecting, and after a decree of sale claim to be heard against the proceedings on the ground that he was not made a party as receiver.[4]

1439. Prior parties. — Persons having interests in the property prior to the mortgage sought to be foreclosed are generally neither necessary nor proper parties to the suit, because the only proper object of the proceedings is to bar all rights subsequent to the mortgage. The decree can have no effect upon the rights of parties having priority, whether they are made parties to the action or not.[5]

[1] Hendry *v.* Quinan, 8 N. J. Eq. (4 Halst.) 534.

[2] See §§ **1231–1236**; Kerrick *v.* Saffery, 7 Sim. 317; Lloyd *v.* Lander, 5 Madd. 282; Richards *v.* Cooper, 5 Beav. 304; Anon. 10 Paige (N. Y.), 20; Willink *v.* Morris Canal & Banking Co. 4 N. J. Eq. (3 Gr.) 377.

[3] Eyster *v.* Gaff, 91 U. S. 521, 525; *S. C.* 13 Albany Law J. 272; Oliver *v.* Cunningham, 6 Fed. Rep. 60; Lenihan *v.* Hamann, 55 N. Y. 652; Cleveland *v.* Boerum, 23 Barb. (N. Y.) 201.

[4] Kirkpatrick *v.* Corning, 38 N. J. Eq. 234.

[5] See § **1440**; **England**: Rose *v.* Page, 2 Sim. 471; Shepherd *v.* Gwinnet, 3 Swans. 151; Richards *v.* Cooper, 5 Beav. 304; Delabere *v.* Norwood, 3 Swans. 144, n. **United States**: Jerome *v.* McCuster, 94 U. S. 734; Woodworth *v.* Blair, 112 U. S. 8; Hagan *v.* Walker, 14 How. 29, 37; Wabash, St. L. & P. Ry. Co. *v.* Central Trust Co. 22 Fed. Rep. 138; Dial *v.* Reynolds, 96 U. S. 340; Peters *v.* Bowman, 98 U. S. 56. **New York**: Wakeman

In some cases prior mortgagees are made parties to the bill, so that the court may with their consent order a sale of the whole estate, and thus make a good and complete title in the purchaser.[1] Sometimes a prior mortgagee is made a party to the suit, with a view to his assenting to a decree for the sale of the whole estate, in which case his mortgage is first paid, and the proceeds then applied to the second mortgage.[2] In such case the legal presumption is that a purchaser at a foreclosure sale gives the full value of the property; and the whole proceeds of the property are then applied to the payment of the incumbrances in the order of their priorities.[3] But it is proper to make the person who holds the prior legal title a party only when his debt is payable, and he is

v. Grover, 4 Paige, 23; Eagle Fire Co. *v.* Lent, 6 Paige, 635, 637; Lewis *v.* Smith, 11 Barb. 152; *S. C.* 9 N. Y. 502; Kay *v.* Whittaker, 44 N. Y. 565; Hancock *v.* Hancock, 22 N. Y. 568; Brundage *v.* Missionary Society, 60 Barb. 204; Payn *v.* Grant, 23 Hun, 134; Merchants' Bank *v.* Thomson, 55 N. Y. 7; Rathbone *v.* Hooney, 58 N. Y. 463; Emigrant Sav. Bank *v.* Goldman, 75 N. Y. 127; Frost *v.* Koon, 30 N. Y. 428; Koch *v.* Purcell, 45 N. Y. Superior Ct. 162; Hotchkiss *v.* Clifton Air Cure, 4 Keyes, 170. **Vermont**: Weed *v.* Beebe, 21 Vt. 495, 499. **Wisconsin**: Strobe *v.* Downer, 13 Wis. 10; Walker *v.* Jarvis, 16 Wis. 29; Macloon *v.* Smith, 49 Wis. 200; Murphy *v.* Farwell, 9 Wis. 102. **New Jersey**: Hoppock *v.* Ramsey, 28 N. J. Eq. 413. **Maryland**: Post *v.* Mackall, 3 Bland, 486, 495; Tome *v.* Loan Co. 34 Md. 12. **Texas**: Hall *v.* Hall, 11 Tex. 526, 547. **North Carolina**: Bogey *v.* Shute, 4 Jones Eq. 174; Weil *v.* Uzzell, 92 N. C. 515. **Alabama**: Young *v.* Montgomery & Eufaula R. R. Co. 2 Woods, 606; Flowers *v.* Barker, 79 Ala. 445; Flournoy *v.* Harper, 1 So. Rep. 545. **Michigan**: Summers *v.* Bromley, 28 Mich. 125; Wurcherer *v.* Hewitt, 10 Mich. 453; Comstock *v.* Comstock, 24 Mich. 39; Pool *v.* Horton, 45 Mich. 404; Wilkinson *v.* Green, 33 Mich. 221; Bell *v.* Pate, 47 Mich. 468; 11 N. W. Rep. 275; Dickerson *v.* Uhl, 39 N. W. Rep. 472. **Indiana**: Pattison *v.* Shaw, 6 Ind. 377; Wright *v.* Bundy, 11 Ind. 398; Krutsinger *v.* Brown, 72 Ind. 466. **Nebraska**: Forrer *v.* Kloke, 10 Neb. 373. **California**: McComb *v.* Spangler, 12 Pac. Rep. 347. **Minnesota**: Banning *v.* Bradford, 21 Minn. 308.

See, however, contrary to authority, Standish *v.* Dow, 21 Iowa, 363; Heimstreet *v.* Winnie, 10 Iowa, 430; Case *v.* Bartholow, 21 Kans. 300. See Morris *v.* Wheeler, 45 N. Y. 708, which, though seemingly in conflict with the decisions in that state is not really so.

[1] Champlin *v.* Foster, 7 B. Mon. (Ky.) 104; Clark *v.* Prentice, 3 Dana (Ky.), 468. In this case the court say that the interest of the mortgagor and of the mortgagee, as well as the security of purchasers, renders this the proper course; that if each of several successive mortgagees could have a decree and sale, there would be no confidence in judicial sales. Persons *v.* Alsip, 2 Ind. 67; Troth *v.* Hunt, 8 Blackf. (Ind.) 580; Warren *v.* Burton, 9 S. C. 197; Evans *v.* McLucas, 12 S. C. 56; Waters *v.* Bossel, 58 Miss. 602.

[2] Vanderkemp *v.* Shelton, 11 Paige (N. Y.), 28; Smith *v.* Roberts, 62 How. (N. Y.) Pr. 196; Ducker *v.* Belt, 3 Md. Ch. 13; Rucks *v.* Taylor, 49 Miss. 552; Miller *v.* Finn, 1 Neb. 254; Emigrant Industrial Sav. Bank *v.* Goldman, *supra;* Metropolitan Trust Co. *v.* Tonawanda, &c. R. R. Co. 18 Abb. (N. Y). N. C. 368.

[3] Vanderkemp *v.* Shelton, *supra;* Buel *v.* Farwell, 8 Neb. 224.

willing to receive payment, and for the purpose of making a sale of the whole title. He is not a necessary party except for such a decree.[1] The court may order a sale subject to a prior incumbrance; and unless the mortgagee with paramount title expressly consents to a sale of the mortgaged estate, the sale must be made subject to his mortgage;[2] and no portion of the proceeds of the sale can be applied in payment thereof.[3]

When a prior incumbrancer is made a party to a foreclosure suit, there should be an allegation of the purpose for which he is made a party; as, for instance that the amount of his mortgage may be ascertained and determined by the judgment of the court, so that the mortgage can be paid out of the proceeds of the sale, or so that the sale may be made subject to the known amount of the lien. If such purpose is not indicated in the complaint nor provided for in the judgment, the prior incumbrancer will not be affected by the judgment.[4]

If a sale of the entire property be decreed in a suit to which the senior mortgagee is not a party, he may enjoin the execution of the decree;[5] though in such case the decree would be void so far as it might affect his rights.

When one is made a party to a foreclosure suit as the holder of a subsequent mortgage, and such party is also the owner of mortgages prior to that of the plaintiff, he may answer in the action and ask to have such prior mortgages paid out of the pro-

[1] Jerome *v.* McCarter, 94 U. S. 734; Norton *v.* Joy, 6 Bradw. (Ill.) 406; Warner *v.* De Witt Co. Nat. Bank, 4 Ib. 305; Hagan *v.* Walker, 14 How. 29, 37. In this case Judge Curtis explains and limits the statement of Chief Justice Marshall in Finley *v.* Bank of United States, 11 Wheat. 304, 306, that the prior mortgagee is a necessary party. And see White *v.* Holman, 32 Ark. 753; Emigrant Savings Bank *v.* Goldman, 75 N. Y. 127; Wabash, St. L. & P. Ry. Co. *v.* Central Trust Co. 22 Fed. Rep. 138; White *v.* Bartlett, 14 Neb. 320.

[2] Langton *v.* Langton, 7 De G., M. & G. 30. In England the practice upon a sale under a subsequent mortgage is to make the mortgagee with paramount title a party to the suit, if it is desired to sell the whole estate, when he is required to consent to such sale, or to refuse it at once; and then if he concurs, a sale of the whole estate is decreed; otherwise the decree is for a sale subject to his security. Wickenden *v.* Rayson, 6 De G., M. & G. 210. See, also, Delabere *v.* Norwood, 3 Swans. 144, n.; Parker *v.* Fuller, 1 Russ. & M. 656; Bigelow *v.* Cassedy, 26 N. J. Eq. 557; Potts *v.* N. J. Arms Co. 17 Ib. 518; Gihon *v.* Belleville Co. 7 N. J. Eq. (3 Halst.) 536.

[3] Basche *v.* Doscher, 67 N. Y. 429; Emigrant Savings Bank *v.* Goldman, *supra; S. C.* 19 Alb. L. J. 159.

[4] Emigrant Industrial Sav. Bank *v.* Goldman, *supra;* Metropolitan Trust Co. *v.* Tonawanda, &c. R. R. Co. 18 Abb. (N. Y.) N. C. 368.

[5] Rucks *v.* Taylor, 49 Miss. 552.

ceeds of sale before applying any portion thereof to the satisfaction of the plaintiff's mortgage;[1] and it is even held that the senior mortgagee when made a party may set up his mortgage as a counter-claim, and may demand affirmative relief by way of foreclosure and sale.[2]

When a subsequent mortgagee makes a prior mortgagee a party to the suit, as well as the owner of the equity, his proceeding, so far as the former is concerned, becomes a bill to redeem.[3] The prior mortgage stands unaffected by the proceeding, although the holder of it suffers default,[4] and may be foreclosed against one who purchases at the foreclosure sale under the junior mortgage.[5] A prior judgment lien[6] or a mechanic's lien[7] stands unaffected in the same way, although the creditor was made a party to the suit to foreclose a junior mortgage.

On the same principle, in a suit to foreclose a mortgage made of a title bond, the vendor is not a proper party. He cannot be affected by the decree.[8] A prior mortgagee cannot properly be made a party to a bill to enforce a mechanic's lien; and if made a party, and a decree be taken against him by default, it will be set aside.[9]

The usual practice of courts of equity, in cases where persons claiming adversely to the mortgagor have been improperly made defendants, is to order the action to be dismissed as to such defendants, without prejudice to the plaintiff's rights in any other proceeding.[10]

Where, however, the complaint states such facts as will, if admitted, subject the defendant's title to the plaintiff's mortgage and to the relief sought, the defendant may be estopped from afterwards setting up his interest as against the judgment in the foreclosure action. The judgment rendered is conclusive between the same parties and their privies, upon all matters embraced

[1] Doctor *v.* Smith, 16 Hun (N. Y.), 245.

[2] Metropolitan Trust Co. *v.* Tonawanda, &c. R. R. Co. 43 Hun (N. Y.), 521; *S. C.* 18 Abb. N. C. 368.

[3] Hudnit *v.* Nash, 16 N. J. Eq. 550.

[4] Straight *v.* Harris, 14 Wis. 509; Dawson *v.* Danbury Bank, 15 Mich. 489.

[5] Williamson *v.* Probasco, 8 N. J. Ch. (4 Halst.) 571.

[6] Frost *v.* Koon, 30 N. Y. 428.

[7] Emigrant Savings Bank *v.* Goldman, 75 N. Y. 127.

[8] Pridgen *v.* Andrews, 7 Tex. 461.

[9] Smith *v.* Shaffer, 46 Md. 573.

[10] Corning *v.* Smith, 6 N. Y. 82; Banning *v.* Bradford, 21 Minn. 308. See, also, Wilkerson *v.* Daniels, 1 Greene (Iowa), 179.

But without dismissing them, their adverse rights may be expressly saved in the decree. San Francisco *v.* Lawton, 18 Cal. 465.

within the issue in the action, whether the issue was joined by the defendant or left unanswered. Thus, in a suit upon a mortgage made by a life tenant, but purporting to convey the fee, certain contingent remainder-men were made parties, the complainant alleging that their interest was inferior to the mortgage, and a decree was rendered against them by default. It was held that the decree barred their interest, and gave the purchaser at the foreclosure sale a good title.[1]

With the consent of the prior mortgagee who has brought a foreclosure suit, a subsequent mortgagee may file a cross-bill for the foreclosure of his mortgage, and the mortgagor cannot object, as it can work no injury to him.[2]

A prior mortgagee is a proper party to a bill in which a receiver is prayed for.[3]

1440. Adverse claimants cannot be made parties to a foreclosure suit for the purpose of litigating their titles. The only proper parties are the mortgagor and mortgagee, and those who have acquired any interests from them subsequently to the mortgage. An adverse claimant is a stranger to the mortgage and the estate. His interests can in no way be affected by the suit, and he has no interest in it. There being no privity between him and the mortgagee, the latter cannot make him a party defendant for the purpose of trying his adverse claim in the foreclosure suit.[4] A bill which makes defendants persons who claim title adversely for the purpose of litigating and settling their

[1] Goebel *v.* Iffla (N. Y.), 18 N. E. Rep. 649, affirming *S. C.* 48 Hun, 21.

[2] Crocker *v.* Lowenthal, 83 Ill. 579.

[3] Miltenberger *v.* Logansport Ry. Co. 106 U. S. 286.

[4] § **1445**; Dial *v.* Reynolds, 96 U. S. 340; Peters *v.* Bowman, 98 U. S. 56; *S. C.* 11 Chicago L. N. 118; 17 Albany L. J. 132. **New York**: Frost *v.* Koon, 30 N. Y. 428; Merchants' Bank *v.* Thomson, 55 N. Y. 7; Lewis *v.* Smith, 9 N. Y. 502; Jones *v.* St. John, 4 Sandf. Ch. 208; Corning *v.* Smith, 6 N. Y. 82; Eagle Fire Co. *v.* Lent, 6 Paige, 635; Holcomb *v.* Holcomb, 2 Barb. 20; Brundage *v.* Missionary Society, 60 Barb. 204; Meigs *v.* Willis, 66 How. Pr. 466. **Michigan**: Wilkinson *v.* Green, 34 Mich. 221; Farmers' and Mechanics' Bank *v.* Bronson, 14 Mich. 361; Horton *v.* Ingersoll, 13 Mich. 409; Chamberlain *v.* Lyell, 3 Mich. 448; McClure *v.* Holbrook, 39 Mich. 42. **Illinois**: Gage *v.* Perry, 93 Ill. 176; Gage *v.* Board of Directors, 8 Bradw. 410; Carbine *v.* Sebastian, 6 Ib. 564, 567; Whittemore *v.* Shiell, 14 Ib. 414. **Minnesota**: Banning *v.* Bradford, 21 Minn. 308; Newman *v.* Home Ins. Co. 20 Minn. 422. **California**: San Francisco *v.* Lawton, 18 Cal. 465; Marlow *v.* Barlew, 53 Cal. 456; McComb *v.* Spangler, 12 Pac. Rep. 347; Croghan *v.* Spence, 53 Cal. 15. **North Carolina**: Bogey *v.* Shute, 4 Jones Eq. 174. **Wisconsin**: Pelton *v.* Farmin, 18 Wis. 222. **Virginia**: Lange *v.* Jones, 5 Leigh, 192. **Vermont**: Lyman *v.* Little, 15 Vt. 576; Kinsley *v.* Scott, 58 Vt. 470. **Indiana**: Comley *v.* Hendricks, 8 Blackf. 189; Pattison *v.* Shaw, 6 Ind. 377; Crogan *v.* Minor, 6 Cent. L. J. 354.

rights is bad for misjoinder and for multifariousness.[1] One who claims under a tax title which became a lien after the mortgage is a proper party, as the claim is made for an interest in the equity of redemption;[2] but one claiming under a tax deed as a paramount title is not a proper party.[3] If, however, it appears that such person, independent of his tax title, has purchased the equity of redemption and assumed the payment of the mortgage debt, he is a proper party defendant.[4] Where the description in the mortgage is erroneous, in a bill to foreclose it, a person who owns lands which would be affected by the erroneous description is not a proper party, when it appears that he was never interested in any portion of the premises identified by proof to be those really mortgaged.[5] The holder of the subsequent mortgage in foreclosing it cannot make one claiming adversely to the mortgagor's title a defendant, for the purpose of trying the validity of the adverse claim.[6]

Whether an asserted claim is such an adverse one as to come within the rule depends not upon what is set up in the answer in regard to it, but upon the allegations of the bill and upon the testimony in the case as to the nature of the alleged adverse claim.[7] Should it appear that a defendant has a legal title which, if valid, is adverse and paramount to the claim of both mortgagor and mortgagee, then neither is the foreclosure suit a suitable proceeding, nor a court of equity the appropriate tribunal, in which to settle the question.[8]

But a subsequent purchaser who has procured releases from a former owner merely to perfect his title of record, and under such circumstances as would render it fraudulent for him to set up such conveyances as a title adverse and paramount to that of the mortgagor, may, under proper allegations, be made a party to the bill for foreclosure, and his title may in such suit be declared null and void.[9]

It has been claimed, however, that when one has been made a defendant in a foreclosure suit and has set up by answer a para-

[1] Dial *v.* Reynolds, 96 U. S. 340.

[2] Horton *v.* Ingersoll, 13 Mich. 409; McAlpin *v.* Zitser (Ill.), 10 N. E. Rep. 901.

[3] Roberts *v.* Wood, 38 Wis. 60; Gage *v.* Perry, 93 Ill. 176; Bozarth *v.* Landers, 113 Ill. 181; McAlpin *v.* Zitser, *supra;* Whittemore *v.* Shiell, 14 Ill. App. 414.

[4] Carbine *v.* Sebastian, 6 Bradw. (Ill.) 564.

[5] Ramsdell *v.* Eaton, 12 Mich. 117.

[6] Corning *v.* Smith, 6 N. Y. 82; Palmer *v.* Yager, 20 Wis. 91.

[7] Carbine *v.* Sebastian, *supra,* quoting text.

[8] Wilkinson *v.* Green, 34 Mich. 221; Summers *v.* Bromley, 28 Mich. 126.

[9] Wilkinson *v.* Green, *supra.*

mount title, and without objections has gone to trial upon that issue, he cannot, if beaten, ask a reversal on the ground that the issue was not properly triable in that action.[1] But the authorities do not sustain this view. All the title a mortgagee can obtain by foreclosure is the title of his mortgagor, and that is the only title that can be considered in the foreclosure suit.[2]

1441. Priority between mortgages. — It has been held, however, that a question of priority between mortgages may be settled in a foreclosure suit upon a first mortgage, by allowing the second mortgagee to intervene and set up the statute of limitations as a bar to the mortgage upon which suit was brought;[3] and in like manner judgment creditors have been allowed to intervene and contest the validity of a mortgage;[4] and a junior mortgagee might perhaps be allowed to make a prior mortgagee a party to the suit upon special allegations of facts, which would give him equitable precedence, or would put the validity of the prior mortgage in issue.[5]

As already noticed, it is a rule of equity, adopted also in the several codes, that additional parties may be brought in when a complete determination of the controversy cannot be had without their presence. The application may be made either by the plaintiff or defendant, though practically it is generally made by the former. But the court may, of its own motion, order in additional parties when, without them, its decree would be ineffectual and incomplete.[6] Furthermore, in the progress of the suit a third person who has an interest in the matter of the suit may, on his own application, be made a party.[7] In Iowa[8] and California[9] it is provided that any person having an interest in the matter in litigation may of right intervene by petition and become a litigant party. He may act with either party to the suit or adversely to both. This system is an innovation upon the established principles of equity.

[1] Bradley *v.* Parkhurst, 20 Kans. 462; Lounsbury *v.* Catron, 8 Neb. 469; Shellenberger *v.* Riser, 5 Neb. 195.

[2] Per Horton, C. J., in Bradley *v.* Parkhurst, *supra.*

[3] Lord *v.* Morris, 18 Cal. 482.

[4] Union Bank at Massillon *v.* Bell, 14 Ohio St. 200.

[5] Dawson *v.* Danbury Bank, 15 Mich. 89; Dickerman *v.* Lust, 66 Iowa, 444; First Nat. Bank *v.* Salem Capital Flour Mills Co. 31 Fed. Rep. 580.

[6] Leonard *v.* Groome, 47 Md. 499.

[7] Dodge *v.* Fuller, 28 N. J. Eq. 578.

[8] Code of Iowa 1873, §§ 2683–2685.

[9] Code Civil Procedure of California 1872, § 387. In the latter state the intervenor must obtain leave of court to file his petition.

In the last named state, in an action to foreclose a mortgage given by a corporation which had become insolvent, certain judgment creditors alleging fraud in the execution of the mortgage, and that it was void against the creditors, were allowed to intervene.[1] So in an action brought to foreclose a mortgage which was barred by the statute of limitations, a subsequent incumbrancer was allowed to intervene and set up the statute as a defence.[2] In an action to foreclose a mortgage on a homestead the mortgagor's wife was allowed to intervene.[3]

1442. New parties who are found to have an interest in the premises may be joined in the bill by amendment, or in a supplemental one, if application be made within a reasonable time;[4] or they may themselves intervene in the original cause by petition, or may maintain a separate bill.[5] A suit may be stayed even on final hearing to bring in subsequent mortgagees and incumbrancers who are found to be proper parties. It is not only a detriment to the complainant, but unjust to all other persons interested in the proceeds of the sale, to allow this to be made subject to an outstanding right to redeem, for that invariably prejudices the sale.[6] The want of necessary parties may be objected to by demurrer when the defect appears upon the face of the bill; otherwise objection may be taken by answer.[7] The mortgagor having an interest in the sale, by reason of his personal liability for the debt, may object to the omission of parties necessary to the making of a perfect title.[8] There is no error in refusing to allow persons who have acquired an interest pending the suit to be made parties to the bill, if they are allowed to defend in the

[1] Stich *v.* Dickinson, 38 Cal. 608. Mr. Justice Crockett said: "The subject matter of the litigation is the note and mortgage, and the right of the plaintiff to have a decree of foreclosure and sale. The intervenor claims, as against the plaintiff, that he and not the plaintiff is entitled to the decree of foreclosure; and as against the defendants, that the mortgage debt is due and unpaid, and that he is entitled to a foreclosure. In this case the intervenor claims the demand in suit, viz., the note and mortgage, and we can perceive no reason founded on the policy of the law which should preclude the settlement of the whole controversy in one action."

[2] Coster *v.* Brown, 23 Cal. 142; Lord *v.* Morris, 18 Cal. 482.

[3] Sargent *v.* Wilson, 5 Cal. 504; Moss *v.* Warner, 10 Cal. 296.

[4] Heyman *v.* Lowell, 23 Cal. 106; Cerf *v.* Ashley, 68 Cal. 419; Johnson *v.* Donvan (N. Y.), 12 N. E. Rep. 594; Jones *v.* Porter, 23 Ind. 66; Levcridge *v.* Marsh, 30 N. J. Eq. 59; Kirkland *v.* Kirkland, 26 N. J. Eq. 276; Conrad *v.* Mullison, 24 N. J. Eq. 65. In Alabama this may be done by petition even after decree and sale. Glidden *v.* Andrews, 6 Ala. 190.

[5] Harris *v.* Hooper, 50 Md. 537.

[6] Gould *v.* Wheeler, 28 N. J. Eq. 541.

[7] Morris *v.* Wheeler, 45 N. Y. 708.

[8] Hall *v.* Nelson, 14 How. (N. Y.) Pr. 32; Morris *v.* Wheeler, *supra.*

name of their grantor who is a party to the suit.[1] Those who have acquired liens upon the mortgaged property during the pendency of the foreclosure suit, if not allowed to interpose a defence in the name of the defendant, can only make themselves parties to the suit by filing a bill to protect their rights.[2] After adding new parties, the statutory notice of *lis pendens* should be made to conform to the amended bill.[3]

When a person made a party to the suit, on the supposition that he had some interest in the premises subject to the mortgage, claims no such interest, he should make a disclaimer and have the suit dismissed as to himself.[4]

If a defendant be found to be an infant, a guardian *ad litem* should be appointed, though if process be served upon the infant without the appointment of a guardian, and judgment be taken by default, the judgment is not void but voidable.[5]

If a guardian *ad litem* be so appointed for an infant who was made a defendant in the suit, but such guardian has no notice of his appointment until after final judgment, he may then upon his prompt application be allowed to answer. But the application will be denied if the plaintiff consents to strike out the infant's name as a party to the proceedings.[6] If the guardian *ad litem* makes no defence and the court has jurisdiction of the cause, a judgment without proof is valid, and cannot be set aside.[7]

But there is so much uncertainty whether service upon the guardian *ad litem*, without service upon the infant, is sufficient, that a purchaser at a foreclosure sale who refuses to complete his purchase because there was no service upon the infant will not be compelled to pay his bid and accept a deed.[8]

If the infant be a non-resident and does not appear, or is not made a party to the suit, the court has no jurisdiction to appoint a guardian *ad litem*, and consequently an appearance by the guardian is not an appearance by the infant; and a judgment in a suit so conducted is not binding upon the infant, and the sale conveys no title as against him.[9]

[1] Chickering *v.* Fullerton, 90 Ill. 520; Lunt *v.* Stephens, 75 Ill. 507.

[2] People's Bank *v.* Hamilton Manuf. Co. 10 Paige (N. Y.), 481.

[3] Clark *v.* Havens, Clarke (N. Y.), Ch. 560.

[4] Felton *v.* Farmin, 18 Wis. 222.

[5] McMurray *v.* McMurray, 66 N. Y. 175.

[6] Farmers' Loan & Trust Co. *v.* Erie Ry. Co. 9 Abb. (N. Y.) N. C. 264.

[7] Boyd *v.* Roane (Ark.), 5 S. W. Rep. 704.

[8] Ingersoll *v.* Mangam, 24 Hun (N. Y.), 202; affirmed 84 N. Y. 622. Question raised but not passed upon in Bosworth *v.* Vandewalker, 53 N. Y. 597.

[9] Ingersoll *v.* Mangam, *supra.*

CHAPTER XXXII.

FORECLOSURE BY EQUITABLE SUIT.

I. Jurisdiction, and the object of the suit, 1443–1450.
II. The bill or complaint, 1451–1478.
III. The answer and defence, 1479–1575.

I. *Jurisdiction, and the Object of the Suit.*

1443. Jurisdiction. — Courts of equity have inherent original jurisdiction of the subject of mortgages both for the foreclosure and redemption of them. Redemption is purely a matter of equity, and the only remedy is here. Although other remedies are used for the foreclosure of mortgages under different systems of law and practice adopted in different states, yet generally courts of equity are not deprived of jurisdiction by the existence of other remedies. In many states, as already seen, jurisdiction in equity of the foreclosure of mortgages is expressly conferred by statute.[1] When provisions in detail are made on this subject, they are generally founded upon principles and rules of practice already established by courts of equity under the general jurisdiction they have always exercised of the subject; and the powers of these courts are only enlarged and defined by the statutes. But even where systems of foreclosure not derived directly from chancery courts have been adopted, courts of equity, where they have not been superseded by codes of practice, which do away with all distinctions between actions at law and in equity, still have concurrent jurisdiction of the subject, and are resorted to, if not generally, then in particular instances, for the reason that they afford a more complete and certain remedy.[2] Even the peculiar statutory mortgage of Louisiana, which is a public act before a notary public, and imports a confession of judgment, and under the statutes of that state is enforced at law by a writ of

[1] See chapter XXX.; Byron *v.* May, 2 Chand. (Wis.) 103; State Bank *v.* Wilson, 9 Ill. (5 Gil.) 57; Warehime *v.* Carroll Co. Build. Asso. 44 Md. 512.

[2] Shaw *v.* Norfolk Co. R. R. Co. 5 Gray (Mass.), 162; Hall *v.* Sullivan Ry. Co. 21 Law. Rep. 138; Shepard *v.* Richardson (Mass.), 11 N. E. Rep. 738; McCurdy's Appeal, 65 Pa. St. 290; McElrath *v.* Pittsburg & Steubenville R. R. Co. 55 Pa. St. 189.

seizure and sale, may be foreclosed in a court of the United States having jurisdiction of the case by a bill in equity.[1]

Although the mortgage contains a power of sale, courts of chancery are not generally deprived of their jurisdiction to foreclose it.[2] Neither is an abortive attempt to foreclose under a power of sale a bar to a foreclosure in equity.[3] It has been stated as a reason why jurisdiction in equity should be retained in such cases, that a mortgagee may be incapable of purchasing at his own sale under the power,[4] though he may at a sale made by an officer under a judgment or decree. Neither does the fact that there is a statutory remedy oust the jurisdiction of a court of equity to enforce a mortgage.[5]

One result of the equitable character of the statutory processes for enforcing mortgages is, that the parties have no right to have the issues tried by a jury; although the court may in its discretion call in the aid of a jury in any case.[6]

1444. Venue. — A foreclosure suit in its usual form is partly an action *in rem*, for the seizure and sale of the property, and partly an action *in personam*, for the ascertainment of the debt of the mortgage debtor, and obtaining a personal judgment against him. When no personal judgment is sought the suit is essentially a proceeding *in rem*, and service by publication, when this is allowed by statute, is sufficient to give jurisdiction.[7] Actions for foreclosure of mortgages are generally required by statute to be brought in the county where the mortgaged premises or some part thereof are situated. But aside from this requirement, it is not a local action, but transitory, and a bill may be brought wherever there is jurisdiction of the parties. The titles to the land cannot be investigated.[8] The courts in England regard the

[1] Benjamin *v.* Cavaroc, 2 Woods, 168.

[2] Walton *v.* Cody, 1 Wis. 420; Byron *v.* May, 2 Chand. (Wis.) 103; Carradine *v.* O'Connor, 21 Ala. 573; Alabama Life Ins. & Trust Co. *v.* Pettway, 24 Ala. 544; Morrison *v.* Bean, 15 Tex. 267; Warehime *v.* Carroll Co. Build. Asso. 44 Md. 512; § 1770.

[3] Rogers *v.* Benton (Minn.), 38 N. W. Rep. 765.

[4] Marriott *v.* Givens, 8 Ala. 694; McGowan *v.* Branch Bank at Mobile, 7 Ala. 823.

[5] Benjamin *v.* Cavaroc, *supra*.

[6] Knickerbocker Life Ins. Co. *v.* Nelson, 8 Hun (N. Y.), 21.

[7] Martin *v.* Pond, 30 Fed. Rep. 15.

[8] Paget *v.* Ede, L. R. 18 Eq. 118; Toller *v.* Carteret, 2 Vern. 494; Broome *v.* Beers, 6 Conn. 198–207; Palmer *v.* Mead, 7 Conn. 149, 157; Kinney *v.* McCleod, 9 Tex. 78; Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202; Owings *v.* Beall, 3 Litt. (Ky.) 103; Grace *v.* Hunt, Cooke (Tenn.), 341; Cole *v.* Conner, 10 Iowa, 299; Finnagan *v.* Manchester, 12 Iowa, 521.

If the statute of the state also provides that "if the county designated in the complaint be not the proper county,

right to redeem as a mere personal right, and not as an estate in a proper technical legal sense, and on this ground take jurisdiction of the foreclosure of land situated in the colonies, when they have jurisdiction of the parties.[1] A court of chancery, acting primarily *in personam* and not merely *in rem*, may, by virtue of its jurisdiction of the parties, make a decree respecting property situated out of the jurisdiction, and may enforce the decree by process against the defendant of whom it has jurisdiction.

The court may decree the foreclosure of a mortgage which embraces property out of the state as well as within it, such, for instance, as a railroad existing in two or more states.[2] But neither the decree nor the conveyance under it, except this be by the person in whom the title is vested, can operate beyond the jurisdiction of the court.[3] Thus if a decree of foreclosure be entered in New York of a mortgage upon land in Connecticut, and a referee appointed by the court sells the land and gives a deed to the purchaser, the deed will be held to convey no title to the land in Connecticut, and the rights of the parties in respect to such land will remain unaffected by the proceedings had in New York.[4]

In those states in this country where the mortgage is considered a mere lien, and the legal estate as remaining in the mortgagor, the decree operates either to deprive the mortgagor of that estate, by vesting it in the mortgagee as by strict foreclosure, or by sale

the action may notwithstanding be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be had in the proper county," the latter provision is a qualification of the former, and the defendant simply has a personal right to have the action tried in the county in which the land is situated, and may waive this right by not insisting upon it or by default. Territory *v.* Judge of District Court (Dak.), 38 N. W. Rep. 439; O'Neil *v.* O'Neil, 54 Cal. 187; Lane *v.* Burdick, 17 Wis. 92; Marsh *v.* Lowry, 16 How. (N. Y.) Pr. 41; Gill *v.* Bradley, 21 Minn. 15.

In Iowa the Code, § 2581, is not imperative in directing the suit to be brought in the county where the land is situated. It may be brought in another county if personal service of the process is had, so that the court in such other county acquires jurisdiction of the defendant, and can render a personal judgment against him; and having acquired such jurisdiction and rendered personal judgment, the court will not require him to institute another suit to obtain a decree of foreclosure, but will render such decree, although the land is in another county. But the action, so far as the enforcement of the mortgage is concerned, is strictly *in rem*, and as such must be brought in the county where the land lies. If the service of process is by publication only, the suit must be in the county where the land is. Iowa Loan & Trust Co. *v.* Day, 63 Iowa, 459; Equitable Life Ins. Co. *v.* Gleason, 56 Iowa, 47.

[1] Paget *v.* Ede, L. R. 18 Eq. 118.

[2] Mead *v.* N. Y., Housatonic & Northern R. R. Co. 45 Conn. 199; Jones on Railroad Securities, § 413.

[3] Watkins *v.* Holman, 16 Pet. 25; Booth *v.* Clark, 17 How. 322.

[4] Farmers' Loan & Trust Co. *v.* Postal Tel. Co. (Conn.) 11 Atl. Rep. 184.

to convey it to the purchaser; and therefore would be regarded as a local action. If a sale of the property is asked for, as this operates *in rem*, jurisdiction is restricted to the local court of the county in which the land lies.[1]

1445. It is not proper in a foreclosure suit to try a claim of title paramount to that of the mortgagor. The only proper object of the suit is to bar the mortgagor and those claiming under him.[2] Whether the claim of title be made under a conveyance by a third party prior to the mortgage or subsequent to it, it is not a proper subject of determination in a foreclosure suit; nor is a claim under a conveyance by the mortgagor made prior to the mortgage.[3] Such adverse claims of title are generally matters of purely legal jurisdiction. A claim under a tax title is one which cannot be considered in a foreclosure suit, unless it affects the equity of redemption.[4] Even if a party having paramount title is made a party and a judgment is entered after a hearing, it will not bind his interest, but will be set aside on application.[5] But questions of priority of lien as between two mortgages by the same mortgagor may properly be determined in a foreclosure of one of them.[6] Questions, too, of priority be-

[1] Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202. "A mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately, or else call upon the mortgagor to redeem his estate presently, or in default thereof to be forever foreclosed from redeeming the same; and though in the latter case the decree might be supposed to properly act on the person of the mortgagor, in the former case it acts emphatically on the thing mortgaged." Owings *v.* Beall, 3 Litt. (Ky.) 103; and see Chadbourne *v.* Gilman, 29 Iowa, 181.

[2] Pelton *v.* Farmin, 18 Wis. 222; Palmer *v.* Yager, 20 Wis. 91; Hekla F. Ins. Co. *v.* Morrison, 56 Wis. 133; Summers *v.* Bromley, 28 Mich. 125, per Graves, J. "A court of equity is not the appropriate tribunal, nor is a foreclosure suit a suitable proceeding, for the trial of claims to the legal title which are hostile and paramount to the interests and rights and title of both mortgagor and mortgagee. Such a trial will neither fall in with the nature of the jurisdiction, or the genius or frame of the particular remedy." See, further, Rathbone *v.* Hooney, 58 N. Y. 463; Merchants' Bank *v.* Thomson, 55 N. Y. 7; Brundage *v.* Missionary Society, 60 Barb. (N. Y.) 204; §§ **1439, 1440.**

In Connecticut, under § 12 of the Practice Act, any person may be made a defendant who claims an interest adverse to the plaintiff, or whom it is necessary to bring in for a complete determination of any matters involved in the suit. An adverse claimant may therefore be made a party defendant to a foreclosure suit De Wolf *v.* Sprague Manuf. Co. 49 Conn. 282, 304, 308.

[3] San Francisco *v.* Lawton, 18 Cal. 465.

[4] Kelsey *v.* Abbott, 13 Cal. 609; § **1440.**

[5] Corning *v.* Smith, 6 N. Y. 82; Lewis *v.* Smith, 9 N. Y. 502; Emigrant Industrial Sav. Bank *v.* Goldman, 75 N. Y. 127; Eagle Fire Co. *v.* Lent, 6 Paige (N. Y.), 635; Adams *v.* McPartlin, 11 Abb. (N. Y.) N. C. 369.

[6] Iowa Co. *v.* Mineral Point R. R. Co. 24 Wis. 93; Bell *v.* Pate, 47 Mich. 468.

tween the owners of different parcels of land mortgaged together may be determined, and the order in which they shall be sold fixed.[1]

A prior mortgagee may elect for himself the time and manner of enforcing his security, and cannot be compelled to enforce it by being made a party to a suit by a junior incumbrancer to foreclose his lien. A junior mortgagee who has brought a suit to enforce his own mortgage, to which he has made the prior mortgagee a party, cannot set up in answer to a suit of foreclosure by the prior mortgagee that he had already commenced a foreclosure suit, and had made the prior mortgagee a party defendant. Such a defence is frivolous.[2]

1446. **It is proper in a foreclosure suit to determine the right of the mortgagor to remove a building** erected by him on the land, and to direct that the land be sold subject to such right. This is incident to the general power and authority of the court to define and describe in its judgment the property to be sold. Such a question should be settled before the sale, so that the sheriff may know what he is selling and the purchaser may know what he is buying. In the mean time the mortgagor may be enjoined from impairing the security by removing the building, which is presumably a part of the freehold.[3]

1447. **A court of equity will prevent an improper use of its process even in a legal way**, as, for instance, when it is apparent that the object of the foreclosure suit is not to procure the satisfaction of the debt, but to obtain a different end by coercing the owner of the equity of redemption. This was done in a case where a wife who owned the fee tendered the mortgagee the amount of his debt, and asked for an assignment of the mortgage, which he refused to make, and the evidence showed that the mortgage was being foreclosed in the interest of the husband, in order to force her to settle a suit by her to annul the marriage, and litigation was then pending about other property. As a new mortgage could not be obtained on account of the litigation, the court ordered that if the mortgagee refused to assign it the proceedings should be stayed.[4]

1448. **A trust deed made for the security of all the cred-**

[1] New York Life Ins. & Trust Co. *v.* Milnor, 1 Barb. (N. Y.) Ch. 353.

[2] Adams *v* McPartlin, 11 Abb. (N. Y.) N. C. 369.

[3] Brown *v.* Keeney Settlement Cheese Association, 59 N. Y. 242.

[4] § 1801; Foster *v.* Hughes, 51 How. (N. Y.) Pr. 20. See, also, a similar case, Struve *v.* Childs, 63 Ala. 473.

itors of the grantor who are not named, and providing for a sale by the trustee only upon request made by a majority of the creditors, should be enforced by a bill in equity, under which the necessary parties can be convened, and their rights ascertained and adjusted.[1] The court will in any case undertake the supervision of the execution of the trust. The decree of sale should embody the provisions of the deed in regard to the sale; but these provisions may be altered when necessary, and in such case the sale must be in accordance with the terms of the decree.[2]

1449. In the foreclosure of a title bond the purchaser is treated as a mortgagor for all purposes of the suit. The rights of the parties are the same as those of the parties to a formal mortgage. Persons interested in the property not made parties to the suit are not affected by the decree.[3] As in the case of the foreclosure of a mortgage, the plaintiff may have judgment for foreclosure, and for the amount due on the bond at the same time.[4] A decree of foreclosure may be entered under a prayer for general relief, although not specifically asked for.[5] A decree for the sale of the land described in the bond, and payment of the proceeds upon the judgment, may further provide that upon full payment the vendor shall convey the property to the purchaser, by a deed containing all covenants stipulated for in the bond.[6]

If the vendor retaining the legal title assigns a promissory note received in consideration of the sale, the assignee upon non-payment of it may proceed to foreclose in his own name, as if it were a mortgage note.[7]

A mortgage of a lease may be foreclosed by a sale of the lease. The purchaser in such case becomes an assignee of the lease and term, and takes subject to the obligation to pay rent.[8]

1450. A tender of payment not accepted does not prevent the mortgagee's proceeding with a bill to foreclose.[9] There may

[1] Hudgins *v.* Lanier, 23 Gratt. (Va.) 494.

[2] Michie *v.* Jeffries, 21 Gratt. (Va.) 334.

[3] Dukes *v.* Turner, 44 Iowa, 575.

[4] Mullin *v.* Bloomer, 11 Iowa, 360; Merritt *v.* Judd, 14 Cal. 59; Kiernan *v.* Blackwell, 27 Ark. 235; Hartman *v.* Clarke, 11 Iowa, 510; and see Lewis *v.* Boskins, 27 Ark. 61.

[5] Herring *v.* Neely, 43 Iowa, 157.

[6] Wall *v.* Ambler, 11 Iowa, 274; § 235.

[7] Blair *v.* Marsh, 8 Iowa, 144.

[8] People *v.* Dudley, 58 N. Y. 323; Catlin *v.* Grissler, 57 N. Y. 363; Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Pardee *v.* Steward, 37 Hun (N. Y.), 259.

[9] See §§ 886–893. In a case where the interest on a mortgage debt was not paid when due, and the mortgagor informed the mortgagee the next day that he was ready to pay it, but made no tender, and the mortgagee directed his solicitor to

be questions as to the amount due on the mortgage, and these can be settled and the mortgage enforced for what is actually due only by a foreclosure suit. Even the pendency of a bill by the mortgagor to redeem does not suspend the right to foreclose. The mortgagor, notwithstanding a decree for redemption, may make default when the actual time for payment arrives.[1] In a foreclosure suit, however, the mortgagor is bound to pay the sum that shall be found due, or else to stand foreclosed of his right of redemption. Until the mortgage debt is actually paid off, the mortgagee retains all the rights and remedies incident to his mortgage. By statute, however, in some states, a bill must be dismissed upon the defendant's bringing into court at any time before the decree of sale the principal and interest due with costs.[2] Should there be a disagreement as to costs, the party making the tender may apply to the court for directions as to the amount of them.[3] Although the tender should properly be brought into court, an irregularity in this respect will be considered waived if the answer of the defendant making the tender be accepted and acted upon without objection.[4]

It has been observed in a former chapter that in several states a tender of the amount due on a mortgage discharges the lien, but does not discharge the debt. The consequence of this doctrine is, that upon proof of a tender of the debt together with any costs incurred at the time, an action for foreclosure will be defeated; but as the debt is not discharged a judgment for that may still be entered and enforced;[5] or, where the law and equity systems are distinct, an action at law may be maintained upon the debt.[6]

II. *The Bill or Complaint.*

1451. General principles. — It is not proposed to set forth except quite briefly the rules and principles upon which a bill in

foreclose, but the solicitor before doing so notified the mortgagor, and waited several days before filing the bill, it was held that the bill was properly brought, and that there was no hardship of which the mortgagor could complain. Probasco *v.* Vaneppes (N. J.), 13 Atl. Rep. 598.

[1] Grugeon *v.* Gerrard, 4 Young & C. 119.

[2] As in **New York**: see Allen *v.* Malcolm, 12 Abb. (N. Y.) Pr. N. S. 335; Hartley *v.* Tatham, 1 Keyes (N. Y.), 222; Kortright *v.* Cady, 21 N. Y. 343.

[3] Morris *v.* Wheeler, 45 N. Y. 708; Pratt *v.* Ramsdell, 16 How. (N. Y.) Pr. 59; Bartow *v.* Cleveland, Ib. 364.

[4] Roosevelt *v.* N. Y. & Har. R. R. Co. 30 How. (N. Y.) Pr. 226; *S. C.* 45 Barb. (N. Y.) 554.

[5] McCoy *v.* O'Donnell, 2 Thomp. & C. (N. Y.) 671.

[6] As in **New York** before the Code: Mann *v.* Cooper, 1 Barb. (N. Y.) Ch. 185.

equity to foreclose a mortgage is to be drawn, prosecuted, and defended. Although the more important features of the pleadings are the same wherever this remedy is used, yet in matters of practice there is much diversity in the different states arising from enactments of different systems of procedure, and the adoption of different rules of practice by the courts. As already noticed when treating of the parties to an equitable action for foreclosure, several states [1] have adopted and made applicable to all civil actions alike codes of procedure, in which the equity method of pleading and practice in a simple form is preserved. The special provisions of these codes relating to mortgages are there given. The general theory and form of the pleadings as a whole are determined by provisions that the complaint or petition shall contain "a plain and concise statement of the facts constituting the cause of action without unnecessary repetition;" and "a demand of the relief to which the plaintiff supposes himself entitled. If a recovery of money be demanded, the amount thereof shall be stated." [2] The answer must contain: "1. A general or specific denial of each material allegation of the complaint (or petition) controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; 2. A statement of any new matter constituting a defence or counterclaim (or set-off), in ordinary and concise language, without repetition." [3] These provisions are merely the essential requisites of a bill and answer in equity; and, therefore, the more important decisions relating to the substance of the pleadings apply in those states in which foreclosure is by a formal bill in a chancery court, and equally in those having these codes of procedure.

1452. The general requisites of the complaint are that it shall allege the execution and delivery of the mortgage and of the note or bond secured by it; the names of the parties to it; the date and amount of it; when and where recorded; a description of the premises, the amount claimed to be due, and the default upon which the right of action has accrued.[4] It must show also that the complainant is entitled to maintain the action, and that the defendants have or claim to have certain interests in the premises or liens upon them. If the plaintiff is not the mortgagee, his right to maintain the action by virtue of an assignment,

[1] See § 1367.

[2] See Pomeroy's Remedies, § 433.

[3] Ib. § 583.

[4] Coulter *v.* Bower, 64 How. (N. Y.) Pr. 132.

bequest, or otherwise, must be set forth with reasonable fulness and certainty. The terms and conditions of both the mortgage and of the bond or note secured by it should be set out. This may be done by proper recitals in the complaint itself, or by annexing copies of these instruments, which are referred to in the complaint and made part of it. The relief which is sought should be fully and explicitly stated.[1]

1453. Facts not inconsistent with the bill may be proved. The evidence may in some respect show a different state of facts from that alleged in the bill; and yet this will be sufficient if the facts shown are not inconsistent with the allegations; as, for example, the amount actually due may be shown to be less than the amount alleged to be due.[2]

1454. An allegation of the execution and delivery of the mortgage is a sufficient allegation of its proper execution and of its validity.[3] An allegation of the execution of the mortgage is also sufficient without any averment of title in the mortgagor. He is estopped by his deed from denying his title; and whatever his title may be, the mortgage may be foreclosed against him.[4] The possession of the mortgage by the mortgagee duly executed, acknowledged, and recorded, is presumptive evidence of delivery.[5]

The witnessing and acknowledgment of the mortgage, where made essential to the validity of it, should be alleged; but if the plaintiff be an assignee of the mortgage these facts are not presumably within his knowledge, and he may properly aver them upon information and belief only.[6]

The mortgage and the note or bond secured by it are usually in some manner made part of the complaint. Copies of them may be set out in the complaint or annexed to it. It is not sufficient merely to file the originals or copies with the complaint without referring to them and making them part of it.[7] But it is sufficient, if the bill sets out the substance of the mortgage.[8]

[1] See § 1578.

[2] Collins *v.* Carlile, 13 Ill. 254.

[3] Moore *v.* Titman, 33 Ill. 358; McAllister *v.* Plant, 54 Miss. 106.

[4] Shed *v.* Garfield, 5 Vt. 39.

[5] Commercial Bank of N. J. *v.* Reckless, 5 N. J. Eq. (1 Halst.) 650.

[6] Fairbanks *v.* Isham, 16 Wis. 118.

[7] Hiatt *v.* Goblt, 18 Ind. 494; Herren *v.* Clifford, 18 Ind. 411. And see Dumell *v.* Terstegge, 23 Ind. 397; Brown *v.* Shearon, 17 Ind. 239; Triplett *v.* Sayre, 3 Dana (Ky.), 590; Harlan *v.* Murrell, Ib. 180. A copy of the note need not be set out when the action is only for the foreclosure of the mortgage. Shin *v.* Bosart, 72 Ind. 105.

[8] Cecil *v.* Dynes, 2 Ind. 266. The ac-

If properly set forth in the complaint the production of the note and mortgage, and proof of service of the summons, is sufficient to justify a decree where no defence is interposed.[1] If the answer admits the execution of the mortgage and note, and does not deny that the amount claimed in the petition is due, there is nothing for the plaintiff to prove.[2]

1455. Proof of execution. — The mortgage and the personal obligation accompanying it, unless admitted, must be proved by competent evidence.[3] If these instruments be attested by a witness, the execution must be proved by him, unless his attendance cannot be procured, or other circumstances make other evidence, such as proof of the handwriting, competent. When the execution is contested by a person who is not a party to the deed, the admission of the mortgagor is not sufficient if the securities are attested by a witness.[4] The mortgagee's possession of the mortgage and the note or bond secured by it is strong evidence of their delivery, and the defendant's answer under oath alleging that they had not been delivered is not enough to overcome the presumption of delivery arising from the mortgagee's possession.[5]

In an action upon a bond and mortgage executed by one as executor and trustee in his representative capacity, it is not necessary to allege and prove that the mortgagor was in fact such executor and trustee, and the facts relating to his appointment.[6]

1456. The complainant must show by his bill either that he is the mortgagee, or that he has legal title to the security by assignment or otherwise. It is not necessary in so many words to aver that the complainant has title to the mortgaged premises; it is sufficient to aver the making of the mortgage.[7] The estate

knowledgment being no part of the cause of action, a copy of the certificate need not be set out. Sturgeon *v.* Daviess Co. 65 Ind. 302.

[1] Whitney *v.* Buckman, 13 Cal. 536; Harlan *v.* Smith, 6 Cal. 173; Mickle *v.* Maxfield, 42 Mich. 304.

[2] Cooley *v.* Hobart, 8 Iowa, 358.

[3] Matteson *v.* Morris, 40 Mich. 52.

[4] Leigh *v.* Lloyd, 35 Beav. 455; Inman *v.* Parsons, 4 Madd. 271.

[5] Long *v.* Kinkel, 36 N. J. Eq. 359.

[6] Kingsland *v.* Stokes, 25 Hun (N. Y.), 107.

[7] Bull *v.* Meloney, 27 Conn. 560. The allegation in this case was that the respondent, to secure the debt described, "did execute to the petitioner a deed of a certain piece of land," described, with the condition.

In Frink *v.* Branch, 16 Conn. 260, 268, Church, J., says: "It is not often, in proceedings of foreclosure, that the title of the mortgage is directly put in issue, or constitutes the principal subject of controversy; although the entire purpose of the plaintiff is, in default of payment, to make a perfect title, which before was qualified; and the ground of his application is, that he has a mortgage title; and without an averment of facts constituting such title, his bill would be defective. It

or interest in the land is not in issue. The only questions are whether the mortgage has been properly executed, and the complainant rightfully holds it and may enforce it. The complainant showing *primâ facie* title, it is for the defendant to allege and prove that he has no title; that, for instance, the mortgage has been discharged. The complainant need not anticipate the defence, and set out in his bill the facts which would invalidate the discharge.[1]

1457. Assignee's title. — If the bill be brought by an assignee of the mortgage, the assignment to him should be fully and distinctly alleged. The same technicality in pleading required at law is not necessary in a court of equity; and accordingly where the bill alleges an assignment of the mortgage, but not of the note or bond, it is sufficient if it appears substantially from the bill that the debt belongs to the complainant.[2] But if it does not so appear, a failure to aver that the bond or note was assigned to the plaintiff, or that he is the holder or owner of it, has been held a fatal defect.[3] If, however, the mortgage was given without a bond or other extrinsic written evidence of the debt secured, an assignment of the mortgage passes the title to the debt; and a complaint which alleges that the mortgage was given for a part of the purchase money, and sets out the assignment of it to the plaintiff, is sufficient.[4] The bill need not aver the record of the assignment;[5] for there is no legal necessity for it.[6] The fact that the assignee holds the mortgage merely as security does not affect his right to recover, but goes only to limit his interest in the proceeds.[7]

may not be necessary either to allege or prove the precise condition of the title, whether it be in fee or in tail, for life or for years; but it seems to us, as the right of the plaintiff to ask the interference of the court depends upon some title in himself to the land mortgaged, either legal or equitable, that it is incumbent upon him to establish it at least *primâ facie;* and of course the defendant must have a corresponding right to attack it."

[1] Frink *v.* Branch, 16 Conn. 260, 268; Palmer *v.* Mead, 7 Conn. 149, 157; Spear *v.* Hadden, 31 Mich. 265; Cornelius *v.* Halsey, 11 N. J. Eq. (3 Stockt.) 27.

[2] Cornelius *v.* Halsey, *supra;* Buckner *v.* Sessions, 27 Ark. 219; Gill *v.* Truelsen (Minn.), 40 N. W. Rep. 254. A description of the plaintiff "as assignee" of the mortgagor is not sufficient. The assignment of the estate cannot be implied from this. But *contra,* see Ercanbrack *v.* Rich, 2 Chand. (Wis.) 100; Babbitt *v.* Bowen, 32 Vt. 437.

[3] Hays *v.* Lewis, 17 Wis. 210; and see Pattie *v.* Wilson, 25 Kans. 326.

[4] Severance *v.* Griffith, 2 Lans. (N. Y.) 38, and cases cited; Caryl *v.* Williams, 7 Lans. (N. Y.) 416; Coleman *v.* Van Rensselaer, 44 How. (N. Y.) Pr. 368.

[5] King *v.* Harrington, 2 Aik. (Vt.) 33.

[6] Fryer *v.* Rockefeller, 63 N. Y. 268.

[7] McKinney *v.* Miller, 19 Mich. 142.

Other liens which the plaintiff may have upon the property he may set out in his complaint and establish beforehand, or may present and establish a claim to the surplus in the same manner as any other person.[1]

1458. A mortgagee having two mortgages upon the same premises may, under the several codes, include both of them in one bill for foreclosure. Two suits being unnecessary, he will be allowed costs in one only.[2] If one mortgage covers only a part of the premises included in the other, suit should be brought in the first place for the foreclosure of the mortgage covering the entire premises, as then a second suit will be unnecessary.[3]

One having two mortgages on the same property may file his bill for the foreclosure of both, although the second of them be not due. If the second mortgage becomes due before the decree, the defendant cannot defeat the action as to this mortgage by tendering the amount due on the first mortgage after the maturity of the second.[4] If the last mortgage be due, but only a part of the first is due, the plaintiff is entitled to a decree for the sale of enough of the mortgaged premises to pay both mortgages, unless the defendant pay the second mortgage and all that has become due of the first.[5]

1459. Foreclosure for instalment. — When the debt is payable by instalments, action to foreclose may be brought when the first instalment falls due and is not paid.[6] If the mortgage secures the payment of several notes, it may be foreclosed upon the non-payment when due of any of them.[7] Foreclosure may be had for any part of the mortgage debt, whether principal or interest, due at the time, and no more; and when the mortgagee elects to sell under a power in the mortgage, or to foreclose in chancery, he can only sell or foreclose for the amount then due, according to the terms of the mortgage; and if he sells the entire estate, that of necessity operates to release the security for the amount not due.[8] If after a foreclosure sale for an instalment, and before

[1] Field *v.* Hawxhurst, 9 How. (N. Y.) Pr. 75; Tower *v.* White, 10 Paige (N. Y.), 395.

[2] Roosevelt *v.* Ellithorp, 10 Paige (N. Y.), 415; Oconto County *v.* Hall, 42 Wis. 59.

[3] Demarest *v.* Berry, 16 N. J. Eq. 481.

[4] Hawkins *v* Hill, 15 Cal. 499.

[5] Hall *v.* Bamber, 10 Paige (N. Y.), 296.

[6] Grattan *v.* Wiggins, 23 Cal. 16.

[7] Miller *v.* Remley, 35 Ind. 539.

[8] Smith *v.* Smith, 32 Ill. 198; Standish *v.* Vosberg, 27 Minn. 175; Fowler *v.* Johnson, 26 Minn. 338; Probasco *v.* Vaneppes (N. J.), 13 Atl. Rep. 598; McLean *v.* Presley, 56 Ala. 211; Johnson *v.* Buckhaults, 77 Ala. 276; Scheibe *v.* Kennedy, 64 Wis. 564; Hatcher *v.* Chancey, 71 Ga. 689.

the foreclosure has become complete by the expiration of the time allowed for redemption, the owner redeems, then the foreclosure sale is in effect annulled, and the same land may be sold for the satisfaction of the other instalments of the mortgage debt.[1] For stronger reasons a foreclosure for a part only of a mortgage debt, when it is all due, operates as a release of the portion not embraced in the foreclosure. The mortgage of record showing that the entire debt is due, and a portion only foreclosed, all persons have a right to conclude that the other part of the debt has been paid. The lien of the mortgage is released as to creditors, and as to parties holding the land under the prior foreclosure and sale.[2]

But by statute in several states a portion of the property if it be divisible may be sold to pay the instalment due; and then upon the happening of another default, a further order of sale may be obtained. If the premises cannot be divided the whole may be sold and the proceeds paid to the mortgagee subject to a proper rebate of interest, or the balance, after paying the amount due, may be paid into court.[3]

When a decree of foreclosure to satisfy a part of the mortgage debt expressly declared that the property should be sold subject to a lien to secure the payment of the notes not then due, and at the sale the premises were purchased by the mortgagee, it was held that this operated as a satisfaction of the entire debt, as well the portion not due as that which was. The purchaser virtually became a mortgagor to the extent of the balance of the mortgage debt. No action at law can afterwards be maintained on the notes.[4] But the mortgage may be foreclosed for an instalment of the interest due without waiting for the maturity of the note, and a sale may be had of so much of the mortgaged premises as will be necessary to pay this with costs of suit.[5] Interest falling due yearly, on a note secured by mortgage, is an instalment of the debt for which the mortgage may be foreclosed in equity. It is due and payable as much as if a separate note had been given for it. Failure to pay interest is a breach of the condition of the mortgage for which it may be foreclosed, although the mortgage

[1] Standish *v.* Vosberg, 27 Minn. 175.

[2] Rains *v.* Mann, 68 Ill. 264; and see Hughes *v.* Frisby, 81 Ill. 188.

[3] §§ 1616–1619. See Statutes, 1322–1366; also, Allen *v.* Wood, 31 N. J. Eq. 103.

[4] Mines *v.* Moore, 41 Ill. 273; Weiner *v.* Heintz, 17 Ill. 259; Hughes *v.* Frisby, *supra.*

[5] Morgenstern *v.* Klees, 30 Ill. 422.

does not expressly provide for such foreclosure.[1] An action at law may also be maintained for the interest as it falls due.[2]

Although a mortgagee holding several notes maturing at different times may, by stipulation in the mortgage or by statute, foreclose as to all when one of them is due, yet he may institute his suit to foreclose that note alone, and a judgment upon this is in Indiana held to be no bar to a subsequent suit to enforce payment of another note afterwards maturing. The several notes are considered as so many successive mortgages.[3] A mortgage given to secure several notes payable at different times is not, it would seem, so far divisible that the holder of all the notes may, after they have all matured, have separate actions upon each note. All the notes should in such case be included in one action; and if the holder obtains a decree and sale upon one note, it is probable that he would not be allowed to maintain a subsequent action upon either of the other notes.[4] At any rate it has been held that when such holder has foreclosed for the note last due only, a subsequent purchaser, without notice that the other notes remain unpaid, has a right to presume that they have already been paid,[5] although in his deed of purchase he assumed the amount of the mortgage as part of the purchase money.[6] When the whole mortgage debt becomes due upon a default in the payment of interest, and thereupon the mortgagee forecloses for the principal and a part of the interest, such foreclosure exhausts the lien.[7]

1460. When the bill is filed by the holder of one of several mortgage notes it should state whether the other notes have been paid, and if not paid by whom they are held, and the dates of their maturing, so that the rights of the holders of the other notes may be determined and protected.[8] But if the complainant holds all the notes he is not obliged to foreclose for all of them. He may take judgment in the foreclosure suit for part of them, and for those not included in the decree of foreclosure he may recover in a suit at law.[9]

When the notes secured by a mortgage are held by different

[1] Scheibe *v.* Kennedy, 64 Wis 564; Walton *v.* Cody, 1 Wis. 420, 431. Brodribb *v.* Tibbets, 58 Cal. 6, to the contrary, is unsupported by authority or reason.

[2] Morgenstern *v.* Klees, 30 Ill. 422.

[3] §§ **606, 1577, 1591, 1700**; Crouse *v.* Holman, 19 Ind. 30; Moffitt *v.* Roche, 76 Ind. 75; Studebaker Manuf. Co. *v.* McCargur, 20 Neb. 500.

[4] Minor *v.* Hill, 58 Ind. 176, per Worden, J.

[5] Rains *v.* Mann, 68 Ill. 264.

[6] Minor *v.* Hill, *supra.*

[7] Hanson *v.* Dunton, 35 Minn. 189.

[8] Levert *v.* Redwood, 9 Port. (Ala.) 79; Hartwell *v.* Blocker, 6 Ala. 581.

[9] Langdon *v.* Paul, 20 Vt. 217.

persons and each brings a foreclosure suit, the actions may be consolidated, and the holders of the notes may have separate judgments.[1]

1461. When one mortgagor is not liable for the debt, as, for instance, when only one of two or more persons who have joined in the execution of the mortgage has executed the note, or incurred any personal liability for the payment of the debt, or when a wife has mortgaged her land to secure her husband's note, the bill should properly pray for a decree of sale against the persons who executed the mortgage, and for a personal judgment only against the debtor.[2]

1462. The bill should so describe the mortgaged property that if a sale is ordered the officer may know on what land to execute the order of court.[3] A bill which contains no sufficient description of the property, and refers to a mortgage annexed which in turn contains no sufficient description, but itself refers therefor to another instrument, is fatally defective.[4] It is generally sufficient, however, to describe the premises as they appear in the mortgage itself.[5] The uncertainty of that description is no ground for refusing a decree of sale, though it may affect the title to the premises when sold.[6] If the description be correct in the bill, a decree entered by default cannot be avoided by showing that the mortgage as recorded misdescribed the premises.[7] If a bill to foreclose a mortgage upon several tracts of land describe some of them sufficiently, though others be insufficiently described, there is no ground for demurrer to the entire bill.[8]

A description in the mortgage may be sufficient to convey the property as against the mortgagor, and yet be insufficient, unaided by proper averments in the complaint, to authorize a decree of foreclosure and sale. Such averments cannot aid a description

[1] Benton *v.* Barnet, 59 N. H. 249. Otherwise in **California**, unless the mortgage provides for the foreclosure upon non-payment of the interest. Brodribb *v.* Tibbets, 58 Cal. 6.

[2] Rollins *v.* Forbes, 10 Cal. 299.

[3] Triplett *v.* Sayre, 3 Dana (Ky.), 590; Struble *v.* Neighbert, 41 Ind. 344; Magee *v.* Sanderson, 10 Ind. 261; Whittlesey *v.* Beall, 5 Blackf. (Ind.) 143; Davis *v.* Cox, 6 Ind. 481; Cecil *v.* Dynes, 2 Ind. 266; Nolte *v.* Libbert, 34 Ind. 163; White *v.* Hyatt, 40 Ind. 385; Howe *v.* Towner, 55 Vt. 315; Crosby *v.* Dowd, 61 Cal. 557.

[4] Struble *v.* Neighbert, *supra;* Emeric *v.* Tams, 6 Cal. 155.

[5] Graham *v.* Stewart, 68 Cal. 374.

[6] Tryon *v.* Sutton, 13 Cal. 490; Whitney *v.* Buckman, Ib. 536; Howe *v.* Towner, *supra.*

As to what is a sufficient description see Hurt *v.* Blount, 63 Ala. 327; Hurt *v.* Freeman, 63 Ala. 335.

For a case of incompatible description see Schmidt *v.* Mackey, 31 Tex. 659.

[7] Deitrich *v.* Lang, 11 Kans. 636.

[8] Rapp *v.* Thie, 61 Ind. 372.

which is so indefinite as to render the mortgage void; but they will cure a description which is merely insufficient, and proper evidence being introduced to support such averment, the decree may specify the true boundaries.[1] In a bill to foreclose a mortgage upon certain real estate, with two mills, and all "appurtenances thereunto belonging," an allegation that a certain milldam and water-power are appurtenant to said mills and real estate, sustained by admissions by the defendant, will support a judgment that the mortgage is a lien upon said dam and water-power as well as upon the real estate more particularly described.[2]

But a complaint upon a promissory note, and also upon the mortgage, may be sustained for the purpose of a judgment upon the note, although the description in the mortgage be insufficient to sustain a judgment for foreclosure and sale.[3]

1463. May omit part. — Although a mortgage cannot be the subject of several different foreclosure suits with reference to different tracts embraced in it, yet if part of the land has been sold under a prior mortgage, or the mortgagee's title to a part of it fails from any cause, or he has released a part from the operation of the mortgage, he may omit such part from his bill.[4] In like manner when a part has not been released, but the mortgagee enforces his mortgage upon one piece only, he thereby waives the lien upon the remainder. The mortgage cannot be foreclosed piecemeal. The mortgagor, however, if he still owns the equity of redemption, cannot complain of the omission, although there be a deficiency for which a personal judgment is rendered against him.[5]

1464. Reforming. — Where by mistake a piece of land not intended to be mortgaged is included in the description, the mortgage may be foreclosed as to the other land without first reforming the deed.[6] But if the premises are misdescribed, so that the instrument must be reformed before proceeding, the equity jurisdiction of the court is broad enough to accomplish this in the same suit, which may afterwards proceed to foreclosure.[7] The mortgage may be reformed not only in the matter of the descrip-

[1] Halstead *v.* Lake County, 56 Ind. 363; Hannon *v.* Hilliard, 101 Ind. 310; Slater *v.* Breese, 36 Mich. 77; Shepard *v.* Shepard, 36 Mich. 173.

[2] Lanoue *v.* McKinnon, 19 Kans. 408.

[3] Bayless *v.* Glenn, 72 Ind. 5; Nix *v.* Williams (Ind.), 11 N. E. Rep. 36.

[4] Sedam *v.* Williams, 4 McLean, 51; Watson *v.* Dundee M. & T. Co. 12 Oreg. 474.

[5] Mascarel *v.* Raffour, 51 Cal. 242.

[6] Conklin *v.* Bowman, 11 Ind. 254; and see Andrews *v.* Gillespie, 47 N. Y. 487; Gillespie *v.* Moon, 2 Johns. (N. Y.) Ch. 585.

[7] §§ 97-99; Davis *v.* Cox, 6 Ind. 481; Halstead *v.* Lake County, *supra;* Bar-

tion, but in any other way, such as supplying the omission of words of inheritance, so that the estate shall be one in fee instead of a life estate.[1] In New Jersey, however, it is held that a mortgage cannot be reformed or corrected in a foreclosure suit, but that the only remedy is by a cross-bill for that purpose.[2] A mistake in the description first made in the mortgage, and afterwards carried all through the proceedings and into the sheriff's deed, may afterwards, by a proceeding in equity, be reformed in all the instruments so as to make them conform to the intention of the parties.[3] A mistake in the mortgage carried into the decree of foreclosure may be corrected by reforming the mortgage and foreclosing anew.[4] When reformed the lien attaches to the property intended to be covered by it from the date of the execution of the mortgage, and not merely from the date of the reformation.[5] If the description in the mortgage deed contains a latent ambiguity as to the boundaries, the court may in the foreclosure suit determine them.[6]

Where a bill to foreclose a mortgage alleges a mistake in the transposition of the names of the parties in the commencement, but does not ask specifically for its reformation, and the decree finds the fact of the mistake, but does not in express terms order its correction, but orders a sale, the mortgage is thus treated as already corrected; and this correction may be done under the general prayer.[7] A clerical error in a name does not require reformation.[8]

1465. Record. — In a bill against the mortgagor it is not necessary to aver that the mortgage is recorded, for he is liable without any record;[9] or to aver that he has not conveyed away the land, for he is a proper party in that case.[10] But if it be against

naby *v.* Parker, 53 Ind. 271; Axtel *v.* Chase, 83 Ind. 546; Alexander *v.* Rea, 50 Ala. 450; McCrary *v.* Austell, 46 Ga. 450; McKay *v.* Wakefield, 63 Ind. 27; Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257; Noland *v.* State (Ind.), 18 N. E. Rep. 26; Palmer *v.* Windrom, 12 Neb. 494.

[1] Durant *v.* Crowell (N. C.), 2 S. E. Rep. 541.

[2] Graham *v.* Berryman, 19 N. J. Eq. 29; French *v.* Griffin, 18 N. J. Eq. 279.

[3] Quivey *v.* Baker, 37 Cal. 465; Zingsem *v.* Kidd, 29 N. J. Eq. 516.

[4] McCasland *v.* Ætna L. Ins. Co. (Ind.) 9 N. E. Rep. 119; Conyers *v.* Mericles, 75 Ind. 443; McGehee *v.* Lehman, 65 Ala. 316; Burkam *v.* Burk, 96 Ind. 270; Jones *v.* Sweet, 77 Ind. 187; Sanders *v.* Farrell, 83 Ind. 28.

[5] Adams *v.* Stutzman (C. P. Ohio, 1878), 7 Am. L. Record, 76.

[6] Doe *v.* Vallejo, 29 Cal. 385.

[7] Beaver *v.* Slanker, 94 Ill. 175, 177.

[8] Germantown Ins. Co. *v.* Dhein, 57 Wis. 521.

[9] Snyder *v.* Bunnell, 64 Ind. 403; Hoes *v.* Boyer, 108 Ind. 494; Mann *v.* State (Ind.), 19 N. E. Rep. 181.

[10] Faulkner *v.* Overturf, 49 Ind. 265; Perdue *v.* Aldridge, 19 Ind. 290.

a purchaser from the mortgagor, according to the practice in some states, the bill should allege either that the mortgage was duly recorded, or that the purchaser bought with notice of it,[1] or assumed the payment of it:[2] but in others it is held that this is unnecessary; that it is purely a matter of defence; that the defendant purchased in good faith without notice, and he must set this up for himself.[3]

An averment that the mortgage was recorded within ninety days after its execution, without any further averment that it was properly, duly, or legally recorded, or statement where it was recorded, is insufficient; and the memorandum or certificate of the recorder on the copy of the mortgage filed with the complaint and therein referred to, being no part of the complaint, does not cure the defect.[4]

But a failure to allege the recording of the mortgage, or a notice to the purchaser of its existence, is cured by proof made of the one fact or the other without objection.[5]

1466. The debt secured by the mortgage must be set out and described. An indebtedness must be alleged as the foundation of the mortgage.[6] If the note or bond secured by the mortgage be set forth, it is not necessary to allege, or if alleged to prove, the consideration or debt for which this was given.[7] Although the note does not correspond with that described in the mortgage, as where this refers to a note payable in one year, whereas the note was payable in sixty days, under an agreement for renewals for a year, if the complaint fully explains this misdescription, and that the mortgage was really designed to secure this note, it states a good cause of action.[8] A complaint which set out an indebtedness of the mortgagors upon certain notes indorsed by them and discounted by the plaintiffs, and alleged that the mortgage was given to secure the payment of a bond for the amount of the indebtedness, the payment of which was thereby considerably extended, and that the mortgagors had failed to

[1] Lyon *v.* Perry, 14 Ind. 515; Peru Bridge Co. *v.* Hendricks, 18 Ind. 11; Magee *v.* Sanderson, 10 Ind. 261; Culph *v.* Phillips, 17 Ind. 209; Faulkner *v.* Overturf, 49 Ind. 265; Stevens *v.* Campbell, 21 Ind. 471; Hiatt *v.* Renk, 64 Ind. 590.

[2] Scarry *v.* Eldridge, 63 Ind. 44.

[3] Stacy *v.* Barker, 1 Sm. & M. (Miss.) Ch. 112; Gallatian *v.* Cunningham, 8 Cow. (N. Y.) 361, 374.

[4] Faulkner *v.* Overturf, *supra.*

[5] Lyon *v.* Perry, *supra.*

[6] Nye *v.* Gribble (Tex.), 8 S. W. Rep. 608.

[7] Day *v.* Perkins, 2 Sandf. (N. Y.) Ch. 359; Brown *v.* Kahnweiler, 28 N. J. Eq. 311; Farnum *v.* Burnett, 21 N. J. Eq. 87.

[8] Merchants' Nat. Bank *v.* Raymond, 27 Wis. 567.

comply with the conditions of the bond, was held to allege a sufficient cause of action.[1]

If the condition of a mortgage be that a third person shall account to the mortgagee for all goods sold by such third person as the mortgagee's agent, a bill to foreclose the mortgage alleging that the agent had sold goods and had not accounted for the proceeds, and was indebted to the mortgagee in a certain amount which the mortgagor had not paid, is good, without first establishing by suit at law the amount of the agent's indebtedness.[2]

If the indebtedness is one resting upon mutual accounts, or is an indebtedness which it is understood the mortgagor is to pay by his labor, the account of which is kept by the mortgagee's agent, the complainant should make out a clear case of indebtedness, and should in evidence of this make a full statement of the accounts, especially if considerable time is allowed to pass without attempting to enforce payment.[3]

1467. Reference to determine amount of debt. — It is the practice generally for the courts, in case the bill is taken as confessed, or the right of the plaintiff is admitted by the answer, to order a reference as a matter of course to determine the amount due upon the mortgage debt.[4] According to the practice of some courts such a reference may be had whether the defendant has answered or not.[5] The reference generally embraces other matters also, as whether the premises can be sold in parcels, or whether there are equities requiring the sale to be made in a particular order; but the referee is always limited in his examination to the subjects specified in the order.[6] He should report the facts, and not merely his conclusions.[7] Upon the coming in of the report, exceptions may be taken to it, otherwise it is confirmed.[8] A final order of sale before the filing of the report is erroneous;[9]

[1] Troy City Bank *v.* Bowman, 43 Barb. (N. Y.) 639; *S. C.* 19 Abb. (N. Y.) Pr. 18; Matteson *v.* Matteson, 55 Wis. 450.

[2] Haskell *v.* Burdette, 32 N. J. Eq. 422.

[3] Webber *v.* Ryan, 54 Mich. 70; Lashbrooks *v.* Hatheway, 52 Mich. 124.

[4] Corning *v.* Baxter, 6 Paige (N. Y.), 178; Chamberlain *v.* Dempsey, 36 N. Y. 144; Anon. 3 How. (N. Y.) Pr. 158.

[5] Bassett *v.* McDonel, 13 Wis. 444; Beville *v.* McIntosh, 41 Miss. 516; Guy *v.* Franklin, 5 Cal. 416; Blackledge *v.* Nelson, 1 Dev. (N. C.) Eq. 422.

As to duties of referee generally, see Wolcott *v.* Weaver, 3 How. (N. Y.) Pr. 159; Gregory *v.* Campbell, 16 Ib. 417; Kelly *v.* Searing, 4 Abb. (N. Y.) Pr. 354.

[6] McCrackan *v.* Valentine, 9 N. Y. 42.

[7] Anon. Clarke (N. Y.), 423; Security Fire Ins. Co. *v.* Martin, 15 Abb. (N. Y.) Pr. 479.

[8] Swarthout *v.* Curtis, 4 N. Y. 415; *S. C.* 5 How. Pr. 198.

[9] Graham *v.* King, 15 Ala. 563.

as it is also when made after the filing of it, and before it is confirmed or set down for hearing.[1] The decree is founded upon the report.[2]

1468. A renewal of the note should be alleged. The bill should contain all the allegations necessary to cover the facts intended to be introduced in evidence, otherwise the evidence will be inadmissible. Therefore, where a bill to foreclose a mortgage given to indemnify an indorser of a note alleged the indorsement of a note of a certain date and amount for the mortgagor, under the mortgage, but did not allege that the note was a renewal of a former one, it was held that although the mortgage secured the liability on the renewed note in the same manner as it secured the liability on the original one, yet, without amending the bill, evidence to prove the note described in the bill to have been given in renewal of a former one was inadmissible.[3]

1469. Proof of note. — It is no objection to the introducing of a note in evidence that it was not fully or perfectly described in the mortgage, the words "or order" in the note being omitted in the description.[4] Although the mortgage note be imperfectly described in the complaint, if it be filed with the complaint, and alleged to be the same note mentioned in the mortgage, and on the trial it be proved to be such, the defective description is cured.[5] The fact that the note offered in evidence corresponds in date, names, and amount with that recited in the mortgage deed, is *primâ facie* evidence that it is the note secured.[6] Where one seeks as assignee to foreclose a mortgage securing a non-negotiable note, he should give evidence of title beyond that derived from the mere possession of the note.[7]

The note or bond must be produced, or a good reason given for its non-production.[8] Failure to produce the note or bond where one was given is evidence of the non-existence or discharge of

[1] Dean *v.* Coddington, 2 Johns. (N. Y.) Ch. 201.

[2] Pogue *v.* Clark, 25 Ill. 351; Sims *v.* Cross, 10 Yerg. (Tenn.) 460.

[3] Boswell *v.* Goodwin, 31 Conn. 74, 81. See Schumpert *v.* Dillard, 55 Miss. 348.

[4] Hough *v.* Bailey, 32 Conn. 288; Boyd *v.* Parker, 43 Md. 182.

[5] Dorsch *v.* Rosenthall, 39 Ind. 209; Cleavenger *v.* Beath, 53 Ind. 172; and see Hadley *v.* Chapin, 11 Paige (N. Y.), 245.

[6] Steinbeck *v.* Stone, 53 Tex. 382; Cowley *v.* Shelby, 71 Ala. 122; Mixer *v.* Bennett, 70 Iowa, 329.

[7] Lashbrooks *v.* Hatheway, 52 Mich. 124.

[8] Beers *v.* Hawley, 3 Conn. 110; Lucas *v.* Harris, 20 Ill. 165; Moore *v.* Titman, 35 Ill. 310; Burgwin *v.* Richardson, 3 Hawks (N. C.), 203; Dowden *v.* Wilson, 71 Ill. 485; Hungerford *v.* Smith, 34 Mich. 300; Schumpert *v.* Dillard, *supra*; George *v.* Ludlow (Mich.), 33 N. W. Rep. 169.

the mortgage debt, and when unexplained is conclusive against the mortgagee's right to recover.[1] The possession of the mortgage alone furnishes no conclusive evidence of the ownership of the bond or note which represents the debt secured, as this may have been transferred to another, who would be entitled to the mortgage security. But although the mortgage may recite the existence of a bond or note, it may be shown that no bond or note was ever given; and if the mortgage itself expressly admits the indebtedness and contains a covenant to pay it, the non-production of the bond or note is then sufficiently accounted for, and furnishes no ground for denying a decree of foreclosure.[2] Although the note representing the debt be declared void, because of a material alteration of it by the holder, the mortgage may nevertheless be enforced if the terms and amount of the debt sufficiently appear in that instrument.[3] The fact that the note is in the possession of the defendant is a good reason why the plaintiff should not produce it in evidence. If in such case it contains, by way of indorsement or otherwise, anything to the advantage of the defendant, he may avail himself of it by offering the note in evidence.[4] If no personal judgment is sought, the recitals in the mortgage, without producing the note, are sufficient to authorize a foreclosure of the mortgage simply, according to some authorities,[5] though by others recitals without the note are not sufficient unless the absence of the note is accounted for.[6] In a suit against a subsequent purchaser, after the death of the mortgagor, and nearly twenty years after the maturity of the mortgage, a very satisfactory showing of a continuing obligation is required, in the absence of the securities themselves.[7]

Secondary evidence of the contents of the note and mortgage is inadmissible until proof is made of the loss or destruction of the originals.[8]

1470. It is not generally necessary to prove payment of the

[1] Bergen *v.* Urbahn, 83 N. Y. 49; Merritt *v.* Bartholick, 36 N. Y. 44.

[2] Munoz *v.* Wilson (N. Y.), 18 N. E. Rep. 855, affirming 42 Hun, 656; Goodrue *v.* Berrien, 2 Sandf. (N. Y.) Ch. 30.

[3] Smith *v.* Smith (S. C.), 3 S. E. Rep. 8; Plyler *v.* Elliott, 19 S. C. 257.

[4] Hawes *v.* Rhoads, 34 Ind. 79.

[5] Arnold *v.* Stanfield, 8 Ind. 323; Hawes *v.* Rhoads, *supra*.

[6] See cases cited above, and Bennett *v.* Taylor, 5 Cal. 502. The reason is that the mortgage is a mere incident to the debt.

[7] Hungerford *v.* Smith, 34 Mich. 300.

[8] Dowden *v.* Wilson, 71 Ill. 485.

consideration money, unless this is put in issue by the pleadings, as the deed itself is sufficient evidence of it.[1]

A mortgage made without consideration, and under a promise never performed, is void for all purposes as against the mortgagor, whether in the hands of the mortgagee or of a third person who has taken it as security without notice of the want of consideration.[2] The assignee could only take what the mortgagee could give him, and that was nothing at all. He can stand in no better situation than the mortgagee himself; and his only remedy is against the mortgagee.

1471. The bill must show that a right of action has accrued. The right of action to foreclose a mortgage, in general, accrues upon any breach of the condition. If there are several breaches, it is necessary to allege and prove only one; and if several are alleged, it is only necessary to prove one to be entitled to a decree.[3] If the mortgagee's right to the money secured by the mortgage is expressly made dependent upon his complying with a certain requirement, as, for instance, the perfecting of the title in some particular, the bill to foreclose the mortgage must distinctly allege the performance of such condition precedent.[4] If the mortgage debt is payable upon demand, the mortgagee may proceed at any time to foreclose, and need not make or allege a previous demand;[5] and although the interest has been regularly paid,[6] if no time of payment be limited in a mortgage, it is payable within a reasonable time,[7] and generally would be regarded as due upon demand. If the mortgage secures a debt already due, and it specifies no time of payment, it may be foreclosed at any time.[8]

It is no valid defence to the foreclosure of a mortgage containing a clause making the principal sum due in case of default in paying the interest for a certain time after it is due, that the defendant was unable to find the holder of the mortgage until after the time for paying the interest had passed, unless the answer

[1] §§ 610, 613; Minot *v.* Eaton, 4 L. J. Ch. 134.

[2] Parker *v.* Clarke, 30 Beav. 54. The mortgage in this case was given by a person in prison, under promises to release him which were never realized.

[3] Beckwith *v.* Windsor Manuf. Co. 14 Conn. 594, 602; Canandarqua Academy *v.* McKechnie, 90 N. Y. 618.

[4] Curtis *v.* Goodenow, 24 Mich. 18.

[5] See chapter xxv.; Gillett *v.* Balcom, 6 Barb. (N. Y.) 370; Bolman *v.* Lohman, 79 Ala. 63.

[6] Austin *v.* Burbank, 2 Day (Conn.), 474.

[7] Tricbert *v.* Burgess, 11 Md. 452.

[8] Wright *v.* Shumway, 1 Biss. 23.

alleges fraud on the part of the plaintiff to prevent the payment of interest.[1] The court will not stay the suit when such default of the whole debt occurs through the mere negligence of the mortgagor.[2]

1472. A bill to foreclose a mortgage given to indemnify a surety must allege a payment by the surety on account of the liability,[3] and the precise amount paid;[4] though if the aggregate sum paid be stated, it is not necessary that the several sums constituting this should be set out in detail.[5] The contract of indemnity is, however, sometimes broken when there is a failure to do a specific act, or when a liability is incurred.[6] Where the indemnifying mortgage contains an express agreement of the mortgagor to pay the debt described, upon his failure to do so when his liability is ascertained and the debt is due, the mortgagee may at once, without having paid the debt, maintain an action for the foreclosure of the mortgage, and recover as damages the total probable loss.[7]

1473. An allegation in the bill that a person made a defendant has, or claims to have, a lien on the premises, which, if it exists, is subsequent to the plaintiff's mortgage, sufficiently shows that he is a proper party;[8] and such allegation is not bad on demurrer as stating no cause of action against him. It is not necessary to describe the interest which each defendant has or claims to have in the mortgaged property.[9] What his interest in the property may be is only important in determining the rights to the surplus.[10] Though this general allegation of interest is held sufficient, it is also the practice to allege the nature of the interest of each subsequent incumbrancer, as that he claims to

[1] Dwight *v.* Webster, 32 Barb. (N. Y.) 47; *S. C.* 10 Abb. Pr. 128; 19 How. (N. Y.) Pr. 349; and see Rosseel *v.* Jarvis, 15 Wis. 571.

[2] Noyes *v.* Clark, 7 Paige (N. Y.), 179.

[3] Shepard *v.* Shepard, 6 Conn. 37; Lathrop *v.* Atwood, 21 Conn. 117; Collier *v.* Ervin, 2 Mont. T. 335; Forbes *v.* McCoy, 15 Neb. 632; Gregory *v.* Hartley, 6 Neb. 356; Stout *v.* Folger, 34 Iowa, 71, 74. See §§ 379–387.

[4] Seeley *v.* Hills (Wis.), 7 Reporter, 312.

[5] Dye *v.* Mann, 10 Mich. 291. See, however, Shepard *v.* Shepard, *supra.*

[6] Gilbert *v.* Wiman, 1 N. Y. 550.

[7] Malott *v.* Goff, 96 Ind. 496; Loehr *v.* Colborn, 92 Ind. 24; Durham *v.* Craig, 79 Ind. 117; Bodkin *v.* Merit, 86 Ind. 560; Reynolds *v.* Shirk, 98 Ind. 480; Catterlin *v.* Armstrong, 101 Ind. 258; Wilson *v.* Stilwell, 9 Ohio St. 467.

[8] Bowen *v.* Wood, 35 Ind. 268; Aldrich *v.* Lapham, 6 How. (N. Y.) Pr. 129; Constant *v.* Am. Baptist, &c. Soc. 21 J. & S. (N. Y.) 170.

[9] Hoes *v.* Boyer, 108 Ind. 494; Daniel *v.* Hester, 24 S. C. 301; McCoy *v.* Boley, 21 Fla. 803.

[10] Drury *v.* Clark, 16 How. (N. Y.) Pr. 424. See Frost *v.* Koon, 30 N. Y. 428, 448.

have an incumbrance by mortgage, the date and record of which are given, or by judgment entered at such a date.[1]

If any one of the defendants is an infant, this fact should appear, with a statement of his interest in the premises, so that a guardian may be appointed.

1474. The bill must show that defendant's interest is subject to the mortgage. Unless the bill discloses that the interest of a person named as a defendant is an interest junior or inferior to the mortgage lien of the plaintiff, it is insufficient to support a judgment against him. It should allege that his claim is subject to the lien of the mortgage.[2] But if a defendant be joined upon the allegation that he has or claims some interest adverse to the plaintiff, the nature and amount of which the latter is ignorant of, and desires that the defendant may be compelled to disclose, and such defendant answers by a general denial, he is in no condition to question a judgment foreclosing the defendant of all right, title, and interest in the premises adverse to the plaintiff, because his answer denies that he has any claim or interest therein.[3]

1475. All the relief sought for in the action should be prayed for in the bill, inasmuch as the court will not generally grant any relief not demanded in the complaint, especially when no answer is interposed.[4] As will be noticed in a subsequent chapter, a judgment for the deficiency may be had in most of the states where foreclosure is obtained by an equitable action, at the same time that a decree for a sale of the property is entered; but if both of these remedies are desired, the complaint must ask for them; for otherwise, after default, no judgment for a deficiency can be rendered;[5] and the omission of a prayer for a sale of the property is ground for demurrer.[6]

1476. The essential grounds for relief or decree asked for must be set out in the bill; as, for instance, if the priority of the mortgage depends upon the fact that it was given for purchase money, or upon the fact that subsequent mortgagees had notice

[1] 1 Crary N. Y. Prac. 289; Clay *v.* Hildebrand, 34 Kans. 694.

[2] See § **1440**; Short *v.* Nooner, 16 Kans. 220; Nooner *v.* Short, 20 Kans. 624; Neitzel *v.* Hunter, 19 Kans. 221.

[3] Blandin *v.* Wade, 20 Kans. 251. And see Bradley *v.* Parkhurst, 20 Kans. 462.

[4] Bullwinker *v.* Ryker, 12 Abb. (N. Y.) Pr. 311; and see Grant *v.* Vandercook, 8 Abb. (N. Y.) Pr. N. S. 455; *S. C.* 57 Barb. 165.

[5] Simonson *v.* Blake, 20 How. (N. Y.) Pr. 484; *S. C.* 12 Abb. Pr. 331; Hansford *v.* Holdam, 14 Bush (Ky.), 210; 7 Reporter, 177.

[6] Santacruz *v.* Santacruz, 44 Miss. 714.

of the mortgage before they took their liens upon the property, no relief founded on these facts can be given unless they are stated in the bill; though being a formal defect the bill may be amended.[1] The bill is not demurrable, however, because the relief demanded is greater than or different from that which the facts entitle the plaintiff to.[2]

1477. A personal judgment for a deficiency cannot be entered against a defendant unless it is asked for in the complaint.[3] But such a judgment may be entered upon a complaint which asks that the mortgage shall be foreclosed, that the mortgaged property shall be sold to pay the debt evidenced by the note, and to pay the costs, attorney's fees, &c., and that execution shall be issued for the balance. A petition no more defective than this may be amended at any time, without costs, so as to make it formal.[4] If a personal judgment is sought against a purchaser from the mortgagor, the ground of his liability must be set forth.[5]

1478. When the mortgage secures several notes some of which are not due when the bill is filed, the complainant should ask in his bill that so much of the debt as may become due before final decree should be included in it.[6] It is irregular to include in the judgment a note which matured after the filing of the bill, unless some foundation is laid for it in the pleadings. If this is not done a supplemental bill should be filed, praying that the note which has matured since the filing of the bill should be included in the decree.[7] The action, however, cannot be commenced before anything is due, and then be made good by a supplemental complaint after a portion of it has matured;[8] but the action being properly begun, additional relief may in this way be had for rights that have since accrued.[9]

[1] Armstrong *v.* Ross, 20 N. J. Eq. 109; Iowa County *v.* Mineral Point R. R. Co. 24 Wis. 93.

[2] Scheibe *v.* Kennedy, 64 Wis. 564.

[3] Simonson *v.* Blake, 12 Abb. (N. Y.) Pr. 331; *S. C.* 20 How. Pr. 484; French *v.* New, 20 Barb. (N. Y.) 481, 484; Bullwinker *v.* Ryker, 12 Abb. (N. Y.) Pr. 311.

[4] Foote *v.* Sprague, 13 Kans. 155.

[5] Hammons *v.* Bigelow (Ind.), 17 N. E. Rep. 192.

[6] See §§ **606, 1459, 1577, 1591, 1700**; Malcolm *v.* Allen, 49 N. Y. 488; Dan Hartog *v.* Tibbitts, 1 Utah T. 328; McLane *v.* Piaggio (Fla.), 3 So. Rep. 823.

[7] Williams *v.* Creswell, 51 Miss. 817; McLane *v.* Piaggio, *supra;* Adams *v.* Essex, 1 Bibb (Ky.), 149; Manning *v.* McClurg, 14 Wis. 350.

[8] McCullough *v.* Colby, 4 Bosw. (N. Y.) 603.

[9] Candler *v.* Pettit, 1 Paige (N. Y.), 168; Bostwick *v.* Menck, 8 Abb. (N. Y.) Pr. N. S. 169.

III. *The Answer and Defence.*

1479. In general. — Besides the special defences arising out of the circumstances of the particular case, there may of course be as many general defences as there are general allegations in the bill or complaint, as well as the defences applicable to contracts generally. There may be a denial of the execution and delivery of the mortgage, and of the plaintiff's right to maintain the action; a denial of personal liability; a denial of any title in the mortgagor at the time of giving the mortgage; an allegation of want of consideration, usury, or the statute of limitations; an allegation of payment, or that the debt is payable upon an event which has not happened;[1] an allegation of a counter-claim or set-off; of non-joinder of defendants; of a discharge; of an equity of redemption in a part of the premises, and an equitable right to require the sale of the residue of them first; and finally, a disclaimer of title or interest. Some of these defences will be illustrated with such citations of cases as seem of general importance and application.[2]

As a general rule, one defendant cannot by his answer impeach the mortgage of a co-defendant; although he alleges in his answer that such mortgage was fraudulent and void, his co-defendant, to whom it belongs, is not bound to put in any defence. Such answer cannot be taken as confessed against him. One defendant can have relief against another only upon a cross-bill.[3]

A cross-bill must be confined to the subject matter of the bill. It is proper whenever it is necessary to adjust all the equities between the parties connected with the subject matter of the original bill. Though matters wholly foreign to the original bill cannot be introduced, new issues in relation to the matters contained in that bill may be brought up by the cross-bill.[4] If the defendant is entitled to affirmative relief against the plaintiff, as, for instance, in case he has overpaid the mortgage, he should file a cross-bill.[5] If a cross-bill is filed by one who has a junior title of record, insisting that he nevertheless has a prior equity, he must allege all the facts necessary to show his prior right.[6]

[1] Lucas *v.* Hendrix, 92 Ind. 54.

[2] For a case where the matters set up in defence were pronounced frivolous, see Weil *v.* Uzzell, 92 N. C. 515.

[3] Brinkerhoff *v.* Franklin, 21 N. J. Eq. 334; Vanderveer *v.* Holcomb, Ib. 105; Davis *v.* Cook, 65 Ala. 617.

[5] Davis *v.* Cook, *supra.*

[3] Hathway *v.* Hagan (Vt.), 8 Atl. Rep. 678.

[6] Blair *v.* St. Louis, H. & K. R. Co. 27 Fed. Rep. 176.

1480. An answer founded upon a release or any written instrument may set it out at length with proper averments, or may give a brief description of it, with averments of the facts connected therewith. An answer which states merely a conclusion of law, without facts to support it, as, for instance, that the mortgage is of no binding effect, and no lien upon the premises described, is unavailing.[1]

1481. The denial of an allegation must be explicit, and not be left to be inferred. Where a complaint sets forth the condition of a bond, and avers that a mortgage securing it was executed "with the same condition as said bond," an answer which merely repeats the words of the condition as stated in the complaint, and avers that it is not contained in the mortgage, is not a denial that such was in substance the condition of the mortgage. The answer, to avail anything, should at least show that there was nothing on the face of the mortgage to connect it with the bond.[2] No defence can be availed of which is not set up in the answer.[3]

In like manner any defence set up by the answer must be set forth by averments which make a complete defence.[4]

1482. The mortgagee's title cannot be questioned in defence to the bill.[5] This can only be investigated at law.[6] If he took, by virtue of his mortgage, any estate whatever which is still subsisting, he is entitled to a decree; and the court will not inquire what interest he has in the mortgaged estate, or whether he has any interest at all in some part of it.[7]

[1] Caryl *v.* Williams, 7 Lans. (N. Y.) 416.

[2] Dimon *v.* Dunn, 15 N. Y. 498, reversing Dimon *v.* Bridges, 8 How. Pr. 16. "It simply pleads the existence of certain language, without denying the substance of the contract as set out in the complaint, and without setting out the contract itself, so that the court may see what it is. It may be well that nothing is said, in terms, in the mortgage, as to the effect of the non-payment of interest; and yet it may refer to the bond in such a manner as to adopt its provisions." Per Chief Justice Denio.

An admission by the mortgagor that he made "some such bond and mortgage" obviates necessity of proof. Wills *v.* McKinney, 30 N. J. Eq. 465.

[3] Higman *v.* Stewart, 38 Mich. 513.

[4] Mann *v.* State (Ind.), 19 N. E. Rep. 181.

[5] § **1440**; Chapin *v.* Walker (C. C. Ark. 1881), 6 Fed. Rep. 794. In this case the respondent having set up an adverse title, the decree was modified so as to provide that the decree and sale thereunder should be without prejudice to the respondent's right to contest the title in an action at law.

[6] Bull *v.* Meloney, 27 Conn. 560; Palmer *v.* Mead, 7 Conn. 149; Broome *v.* Beers, 6 Conn. 198; Anderson *v.* Baxter, 4 Oreg. 105.

[7] Hill *v.* Meeker, 23 Conn. 592; Wooden *v.* Haviland, 18 Conn. 101; Williams *v.* Robinson, 16 Conn. 517.

An exception is apparently made to this rule that the title is not in issue, in cases where usury may be shown in defence under statutes which would make the deed absolutely void, and usury in the loan is established. This, however, is not strictly an investigation of the title, but rather of the validity of the instrument; just as this is the inquiry when it is claimed that the maker of it was not of sound mind, or that he made it under duress, or that he did not make it at all.[1]

The owner of the equity of redemption subject to two mortgages cannot object that the senior mortgagee yields his priority of lien to the junior mortgagee.[2]

It is no defence that the mortgage was executed by the heirs of the owner after his death, and that he left debts which remain unpaid, and that the estate is under administration in the probate court.[3]

1483. A mortgagor is estopped to deny his title.[4] He cannot set up as a defence for himself against the mortgagee, that the property so mortgaged is trust property which he had no right to mortgage. He cannot claim adversely to his deed, but is estopped by it.[5] Whether this estoppel arises from the making of the mortgage deed, or from the relation of the mortgagor at common law as a *quasi tenant* of the mortgagee, or from express or implied covenants for title, has been an unsettled question. But at the present time, and especially where a mortgage is merely a lien and not a title, this estoppel must be regarded as arising only from a covenant for title, express or implied. In the absence of such a covenant, the mortgagor may therefore show what his interest in the mortgaged lands was at the time of the delivery of the mortgage, and may show that a subsequently acquired title does not enure to the benefit of the mortgagee.[6] A wife joining her husband in a deed of his land, but not making any covenants, is not estopped to claim title to the land under a mortgage held by her.[7] The decree binds his interest, whatever that may be, and

[1] Cowles *v.* Woodruff, 8 Conn. 35.

[2] Mobile & Cedar Point R. R. Co. *v.* Talman, 15 Ala. 472.

[3] Cook *v.* De la Guerra, 24 Cal. 237.

[4] Bush *v.* Marshall, 6 How. 284; Dime Sav. Bank *v.* Crook, 29 Hun (N. Y.), 671; Herber *v.* Christopherson, 30 Minn. 395; Krupp *v.* Krugel, 12 Phila. (Pa.) 174; Strong *v.* Waddell, 56 Ala. 471.

[5] §§ **682, 683**; Boisclair *v.* Jones, 36 Ga. 499; Usina *v.* Wilder, 58 Ga. 178; Strong *v.* Waddell, *supra;* McLoon *v.* Smith, 49 Wis. 200.

[6] National Fire Ins. Co. *v.* McKay, 1 Sheldon (N. Y.), 138; Haggerty *v.* Byrne, 75 Ind. 479.

[7] Van Amburgh *v.* Kramer, 16 Hun (N. Y.), 205.

nothing more.[1] A mortgage made by the heirs of a deceased owner, before the settlement of the estate, cannot be objected to by them on the ground that the creditors and legatees of the estate have not been paid.[2] A mortgagor may, however, in an action brought by an assignee, set up and prove a mistake in the drawing of the instrument and have it reformed.[3] But it has been held that a mortgagor who had given a mortgage upon land held by him under the preëmption act, after filing his declaratory statement and before entry, and therefore void, was not estopped from setting up the invalidity of it in defence when no fraud, misrepresentation, or concealment on his part was shown.[4]

A wife who has joined in her husband's mortgage of certain lands, including the homestead, cannot on foreclosure claim that the home lot was her separate property, and that she had not known that the mortgage covered it; that she had not read the mortgage nor heard it read; and that if she had, she would not have recognized the home lot by its description, if it appear that the mortgagee had acted in good faith and had done nothing to mislead her.[5]

1484. The mortgagor may be estopped by his declarations or agreements from setting up a defence otherwise valid; as where a purchaser of land subject to a mortgage admitted to a third person that it was all right and valid, and thereby induced him to buy it, he was not allowed afterwards to urge a failure of consideration of the mortgage to the injury of the assignee.[6] And so he may be estopped from taking advantage of a sale made without proper authority in the officer to sell, because no judgment of foreclosure had been entered on the mortgage: his admission that the debt was due; his acts at the sale in forwarding it and waiving matters of form; his delivery of possession to the purchaser, and his standing by and suffering purchasers to improve the property, are sufficient for this purpose.[7] And so where a mortgage made by one member of a banking firm to his co-partner was sold by them to a purchaser, with the representation that it was a good bond and mortgage, each of them was held to be estopped from setting up the defence of usury.[8] A mortgagor

[1] Bird *v.* Davis, 14 N. J. Eq. 467. See Hoff *v.* Burd, 17 Ib. 201.

[2] Cook *v.* De la Guerra, 24 Cal. 237.

[3] Andrews *v.* Gillespie, 47 N. Y. 487.

[4] Brewster *v.* Madden, 15 Kans. 249.

[5] Peake *v.* Thomas, 39 Mich. 584, 585.

[6] Smith *v.* Newton, 38 Ill. 230.

[7] Cromwell *v.* Bank of Pittsburg, 2 Wall. Jun. 569.

[8] Hoeffler *v.* Westcott, 15 Hun (N. Y.), 243.

who has induced another to take an assignment of his mortgage is estopped from denying the validity of it in the assignee's hands.[1] Where a wife has given a mortgage as surety for her husband, in an action to foreclose the mortgage after her death, the husband having procured the mortgagee's money by the mortgage, is estopped from disputing its validity.[2]

1485. Defences against assignee. — It is not often that the mortgage is an obligation to the mortgagee personally which neither his assignee nor personal representative can enforce; yet such a mortgage may be made; and such was held to be the effect of a mortgage which was the only evidence of the indebtedness secured, and this was "to be paid by the mortgagor to the mortgagee, when called on by said mortgagee; and the mortgagor does not agree to pay the above sum to any one else except the mortgagee." The mortgagee having died without demanding payment, his administrator could not make demand, and maintain a suit upon the mortgage.[3] It may be presumed in such a case that the mortgagee intended that the debt should not be paid at all unless he himself should see proper to demand it; and that if he made no demand the indebtedness should be retained by the mortgagor as a gift; and having died without making such demand the gift became complete.

In those states in which a transfer of the mortgage note carries with it the mortgage security, it is no defence to a suit by an assignee that he had no formal assignment of the mortgage.[4] The fact that he purchased the mortgage at a discount is no defence.[5] If the assignment was obtained by fraud, the defendant may show that he has paid it to the mortgagee from whom the plaintiff so obtained it.[6]

In a suit by an assignee he should ordinarily prove the execution of the assignment to himself; but if he produces the note and mortgage, and the mortgagee, who is made a party, is defaulted, a judgment creditor of the mortgagor cannot call in question the assignee's title.[7]

[1] Johnson *v.* Parmely, 14 Hun (N. Y.), 398; Norris *v.* Wood, Ib. 196.

[2] Ellis *v.* Baker (Ind.), 19 N. E. Rep. 193.

[3] Sebrell *v.* Couch, 55 Ind. 122.

[4] Rice *v.* Cribb, 12 Wis. 179; Jackson *v.* Blodget, 5 Cow. (N. Y.) 202, 205; Jackson *v.* Willard, 4 Johns. (N. Y.) 41, 43.

[5] Knox *v.* Galligan, 21 Wis. 470; Croft *v.* Bunster, 9 Wis. 503; Grissler *v.* Powers, 53 How. Pr. (N. Y.) 194, and cases cited.

[6] Hall *v.* Erwin, 60 Barb. 349; *S. C.* 57 N. Y. 643; 66 N. Y. 649.

[7] Markson *v.* Ide, 29 Kans. 649.

The motives of the assignee in acquiring the assignment, and in foreclosing the mortgage, cannot be set up in defence, and afford no ground for staying the suit.[1]

It is no defence to a suit by an assignee to foreclose a mortgage that the assignee took title from motives of malice, and solely with a view to bring an action, and that the assignor assigned it from a like motive, and without consideration. It is sufficient to sustain the action that the debt is due and has been transferred to the plaintiff; and the mortgagor can only arrest the action by paying or tendering, and bringing into court, the amount due.[2]

Where an assignee seeks to foreclose a mortgage which the mortgagee testifies was given without consideration moving from him, and that he assigned it at the request of one of the mortgagors without consideration, this evidence casts upon the complainant the burden of proof that there was a consideration for the mortgage.[3]

1486. Assignee for value. — It is not necessary to constitute a *bonâ fide* holding by the assignee that he should have paid value for the security at the time of receiving it. A past consideration is sufficient.[4] A farmer and his wife, on the line of a proposed railroad in Wisconsin, subscribed to stock in the road, and mortgaged their farm to secure a negotiable note given in payment of the subscription, upon representations made by agents of the road and others that the road would prove a very lucrative investment, and a very profitable thing to the neighborhood. After a good deal of money had been laid out in grading and other work upon the road, the further building of it was stopped for want of funds, and it remained unfinished. The mortgage having been assigned before maturity to a director of the road, who was also a large creditor of it at the time the mortgage was made, upon a bill filed by him to foreclose it, he was held to be a *bonâ fide* holder for value, and entitled to a decree.[5]

1487. When assignee takes free from equities. — The assignee before maturity of a negotiable note secured by mortgage

[1] Davis *v.* Flagg, 35 N. J. Eq. 491.

[2] Morris *v.* Tuthill, 72 N. Y. 575.

[3] Bishop *v.* Felch, 7 Mich. 371. See Hughes *v.* Thweatt, 57 Miss. 376.

[4] Croft *v.* Bunster, 9 Wis. 503.

[5] Sawyer *v.* Prickett, 19 Wall. 146. In this case, moreover, the representations were not considered binding, because they were promissory, and not representations of existing facts peculiarly within the knowledge of the party making them. And see Leavitt *v.* Pell, 27 Barb. (N. Y.) 322.

takes it free from any equitable defences which the mortgagor might have had against it in the hands of the mortgagee, of which the assignee had no notice at the time the assignment was made.[1] The defendant cannot set up payment to the mortgagee after the assignment of the mortgage.[2] Even duress or fraud in the execution of the mortgage is not available as a defence against such an assignee.[3] When a defence valid against the assignor is made, the plaintiff must show that he is a *bonâ fide* purchaser for value, where that issue is raised by the pleadings.[4] The rule in this respect is the same whether the negotiable note is secured by a mortgage or not. "The contract as regards the note," says Mr. Justice Swayne,[5] "was, that the maker should pay it at maturity to any *bonâ fide* indorsee, without reference to any defences to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfilment of that contract. To let in such a defence against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently in good faith became a party. If the mortgagor desired to reserve such an advantage, he should have given a non-negotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who 'puts trust and confidence in the deceiver should be a loser rather than a stranger.'" [6] Moreover, the mortgage being considered a mere incident of the debt, an accessory to the principal thing, the rights of the assignee in respect to the mortgage are determined by his rights respecting the debt.[7] If, therefore, the mortgage be given to secure the payment of a non-negotiable note or bond, the assignee takes it, as he would such

[1] See § **834**; Carpenter *v.* Longan, 16 Wall. 271; Beals *v.* Neddo, 1 McCrary, 206; Swett *v.* Stark, 31 Fed. Rep. 858; Taylor *v.* Page, 6 Allen (Mass.), 86; Pierce *v.* Faunce, 47 Me. 507; Reeves *v.* Scully, Walk. (Mich.) 248; Cicotte *v.* Gagnier, 2 Mich. 381; Bloomer *v.* Henderson, 8 Mich. 395; Fisher *v.* Otis, 3 Chand. (Wis.) 83; Martineau *v.* McCollum, 4 Ib. 153; Croft *v.* Bunster, 9 Wis. 503; Cornell *v.* Hichens, 11 Wis. 353. *Contra*, see Baily *v.* Smith, 14 Ohio St. 396; Palmer *v.* Yates, 3 Sandf. (N. Y.) 137.

Otherwise in Illinois: Colehour *v.* State Sav. Inst. 90 Ill. 152; § **838**.

[2] Mead *v.* Leavitt, 59 N. H. 476.

[3] Beals *v.* Neddo, *supra;* Simpson *v.* Del Hoyo, 94 N. Y. 189.

[4] Getzlaff *v.* Seliger, 43 Wis. 297; Matteson *v.* Morris, 40 Mich. 52.

[5] See Carpenter *v.* Longan, *supra.*

[6] "Accessorium non ducit, sequitur suum principale."

[7] Carpenter *v.* Longan, *supra;* Martineau *v.* McCollum, *supra;* Potts *v.* Blackwell, 4 Jones Eq. (N. C.) 58; Bennett *v.* Taylor, 5 Cal. 502.

note or bond, subject to the equitable defences which the defendant would have against it in the hands of the assignor.[1]

1488. It is a good objection to a suit that the complainant has parted with his interest in the mortgage before the time of answering; the party in interest is not before the court.[2] But the assignment of a note and mortgage after the commencement of foreclosure proceedings does not affect a decree obtained therein, if the assignment neither appears of record nor is brought to the knowledge of the court.[3] On the other hand, a defendant who has no interest in the property cannot assail the mortgage.[4] If the mortgagor, after having suffered a bill of foreclosure to be taken as confessed against him, conveys his interest in the property, the purchaser takes it subject to the rights which the complainant has acquired in the suit, and to the admissions made by the mortgagor's default; and no defence can then be taken which would not have been open to the mortgagor had he not sold his interest.[5]

1489. Indemnity. — Although the condition of a mortgage may be for the payment of a certain sum of money, it is competent to show, by parol evidence, that the mortgage was really given to indemnify the mortgagee as a surety, and that his liability has been discharged without his being damnified. The effect of such proof is not to contradict or vary the mortgage, but to indemnify the demand to which it really refers.[6] If there has been no breach of the condition of a mortgage of indemnity, there can be no foreclosure of it.[7]

Where a suit is brought to foreclose a lost mortgage and note, the defendant cannot resist the payment of either principal or costs on the ground of a refusal to give him indemnity.[8] In case the defendant is entitled to any indemnity, he cannot take advantage of the right in this suit, unless he can show he was ready before suit to tender payment on receiving indemnity.[9]

[1] Matthews *v.* Wallwyn, 4 Ves. 118, 126.

[2] Wallace *v.* Dunning, Walk. (Mich.) 416; and see Smith *v.* Bartholomew, 42 Vt. 356.

[3] Bigelow *v.* Booth, 39 Mich. 622; and see Ellis *v.* Sisson, 96 Ill. 105.

[4] Carleton *v.* Byington, 18 Iowa, 482.

[5] Watt *v.* Watt, 2 Barb. (N. Y.) Ch. 371.

[6] Colman *v.* Post, 10 Mich. 422; Kimball *v.* Myers, 21 Mich. 276.

[7] Ide *v.* Spencer, 50 Vt. 293. As to breach of condition of a mortgage to secure one for becoming bail, see Griswold *v.* Barker, 57 Vt. 53.

[8] Sharp *v.* Cutler, 25 N. J. Eq. 425.

[9] Massaker *v.* Mackerley, 9 N. J. Eq. (1 Stockt.) 440.

1490. Want of consideration for the mortgage or failure of it is a good defence to it as between the original parties,[1] but the proof should be as clear and convincing as that required for the reformation of written instruments.[2] A partial failure of consideration is a defence *pro tanto*. These defences must be distinctly pleaded.[3] A mortgage given in consideration that the mortgagee should serve nine months in the army as a substitute for the mortgagor, who had been drafted, cannot be enforced when it appears that the mortgagee deserted within a few weeks after being mustered into the service.[4]

If it appears that the mortgage was given to secure future advances which were never made, the bill will be dismissed.[5] If some advances are made upon the mortgage, though not to the stipulated amount, the mortgage will be enforced to the amount actually advanced upon it.[6] On the foreclosure of a mortgage given to secure the payment of judgments confessed by the mortgagor, but which were void for want of compliance with the statute, the defence may be taken that no indebtedness is shown, and the bill should be dismissed.[7] But when there was an actual consideration for a mortgage, generally the inquiry cannot be made whether the consideration was full and adequate.[8]

A junior mortgagee may set up want of consideration in a senior mortgage which he has assumed, or expressly bought subject to.[9]

1491. One who buys land which is by the terms of his deed subject to a prior mortgage, whether he expressly assumes it as part of the purchase money or not, cannot set up as a defence to the foreclosure of it any failure or want of consideration in the mortgage as between the parties to it.[10] In a case in New York

[1] § **610**; Conwell *v.* Clifford, 45 Ind. 392; Mell *v.* Moony, 30 Ga. 413; Akerly *v.* Vilas, 21 Wis. 88; Pacific Iron Works *v.* Newhall, 34 Conn, 67, 77; Banks *v.* Walker, 2 Sandf. (N. Y.) Ch. 344; *S. C.* 3 Barb. Ch. 438; Marris *v.* Davis (Va.) 8 S. E. Rep. 247; Cawley *v.* Kelley, 60 Wis. 315.

[2] Bray *v.* Comer (Ala.), 1 So. Rep. 77; Chaffe *v.* Whitfield (La.), 4 So. Rep. 563.

[3] Philbrooks *v.* McEwen, 29 Ind. 347; Matteson *v.* Morris, 40 Mich. 52.

[4] Nelson *v.* McPike, 24 Ind. 60.

[5] McDowell *v.* Fisher, 25 N. J. Eq. 93.

[6] Baldwin *v.* Flagg, 36 N. J. Eq. 48.

[7] Austin *v.* Grant, 1 Mich. 490.

[8] Norton *v.* Pattee, 68 N. Y. 144.

[9] Coleman *v.* Witherspoon, 76 Ind. 285.

[10] § **744**; Horton *v.* Davis, 76 N. Y. 495; Price *v.* Pollock, 47 Ind. 362. The partial failure of consideration in this case was from a deficiency in the quantity of land. In some of the earlier cases in New York, grantees who had assumed the payment of existing liabilities were allowed to set up defences other than usury; all the authorities agreeing that such grantees cannot defend on that ground. See Russell *v.* Kinney, 1 Sandf. Ch. 34; Jewell *v.* Harrington, 19 Wend.

the owner of land made a mortgage to an insurance company for four thousand dollars, upon which the company advanced only two thousand dollars at the time. A further loan from the company of two thousand dollars was then contemplated, but was never made. The owner conveyed his equity of redemption subject to the mortgage, for a consideration expressed in the deed, from which the four thousand dollars were deducted. Several subsequent conveyances of the premises were made in the same manner. Afterwards the owner procured the insurance company to assign the mortgage to a creditor, who paid the company the amount advanced upon the mortgage, and credited the owner the balance of the four thousand dollars secured. The creditor was allowed to foreclose the mortgage for the entire sum of four thousand dollars, against the objection of the purchaser of the equity of redemption that it was a valid lien for only the amount originally advanced upon it with interest.[1] The court said that the purchaser's position was in no respect different from what

471; Hartley *v.* Tatham, 26 How. Pr. 158; Lester *v.* Barron, 40 Barb. 297. But the rule is established that the grantor may create any lien he pleases upon the land, whether it be founded on any consideration as between him and the person in whose favor it is made or not; and if his grantee either expressly or impliedly undertakes for a consideration to pay it, he cannot defend against it. See cases cited under this section, and also Ritter *v.* Phillips, 53 N. Y. 586.

[1] Freeman *v.* Auld, 44 N. Y. 50, overruling same case in 37 Barb. 587. Mr. Justice Hunt said: "Two objections are mainly relied upon as justifying the judgment below: 1st. That the insurance company advanced only the sum of $2,000; that they could have enforced the mortgage for no greater amount against Allen and Stevens (the mortgagors); and that they could transfer to their assignee no greater rights than they possessed; 2d. That if Allen and Stevens, or the insurance company as their trustee, could have recovered the whole amount, that it was a lien or equitable claim, and that the simple transfer of the mortgage did not carry with it such lien or claim. 1st. I look upon the insurance company as holding this mortgage in a double capacity; as owners to one half of the amount, and as trustees for Allen and Stevens for the residue. The latter wished to impose a mortgage of $4,000 upon the lot. The insurance company did not wish to advance the whole amount, and the mortgagees were willing to accept a reduced amount, allowing the mortgage to stand for its face. It is quite true that, in a controversy between the mortgagees and the company, the latter could not have compelled the payment of the full amount. It is equally true that, where there is no such controversy, where the makers desire it to be enforced to its nominal amount, where the holders of the property have consented and agreed that it should be so enforced, and have had a deduction of $2,000 from their purchase money based upon the payment by them, or the subjecting the premises to the full amount of the mortgage, that the payment in full should be enforced. The insurance company may collect the full sum. They hold it for their own benefit to the amount advanced by them; as trustees for Allen and Stevens for the amount not allowed." See Grissler *v.* Powers, 53 How. (N. Y.) Pr. 194, distinguished from above.

it would have been had the original owner counted out in cash the sum specified in the mortgage, and placed it in the hands of their grantee as their messenger, with directions to place it in the hands of the company, and he had placed it in the hands of his grantee, who had in turn delivered it to his grantee, the owner of the equity of redemption, with the same directions, who with the money in his pocket nevertheless proposed to prove that the mortgage was not a valid security for the amount in excess of the original advance.

1492. Fraud is a good defence when it is shown that it was practised by the mortgagee or his agents upon the mortgagor; or when the mortgagee or his assignee, at the time of taking the mortgage, was aware that a fraud had been committed upon the mortgagor.[1] The answer should distinctly state the several facts necessary to constitute the fraud, and to bring the knowledge of it home to the mortgagee. The fraud may be a defence to the whole claim, or it may be a defence in part, and available as a counter-claim. The burden of proof, that a mortgage was procured by false representations, lies with the defendant.[2]

In a foreclosure suit against a husband and wife, the latter may in her answer aver that she did not intend to convey the land described, and was induced to sign the mortgage through fraud and collusion on the part of her husband and the mortgagee. She need not assert this defence by cross-bill.[3] An answer by the wife, alleging that she executed the mortgage under duress by her husband is insufficient, unless it also shows that the mortgagee was in some way connected with or had knowledge of the duress.[4]

A subsequent mortgagee may set up fraud in the consideration of a prior mortgage by answer, without filing a cross-bill; and a general allegation of such fraud is sufficient where the fraud alleged is that the mortgage was given to defraud creditors, and was without consideration.[5]

[1] §§ 624–632; Hicks *v.* Jennings, 4 Woods, 496; Aikin *v.* Morris, 2 Barb. (N. Y.) Ch. 140; Reed *v.* Latson, 15 Barb. (N. Y.) 9; Allen *v.* Shackelton, 15 Ohio St. 145. And see Abbott *v.* Allen, 2 Johns. (N. Y.) Ch. 519; Champlin *v.* Laytin, 6 Paige (N. Y.), 189; affirmed, 18 Wend. 407; Bennett *v.* Bates, 26 Hun N. Y.), 364; Cornell *v.* Corbin, 64 Cal. 197.

[2] Sloan *v.* Holcomb, 29 Mich. 153; Perrett *v.* Yarsdorfer, 37 Mich. 596; Elphick *v.* Hoffman, 49 Conn. 331.

[3] Genthuer *v.* Fagan (Tenn.), 3 S. W. Rep. 351.

[4] Gardner *v.* Case (Ind.), 13 N. E. Rep. 36; Line *v.* Blizzard, 70 Ind. 23; Talley *v.* Robinson, 22 Gratt. (Va.) 888; Green *v.* Scranage, 19 Iowa, 461.

[5] McGuckin *v.* Kline, 31 N. J. Eq. 454;

1492 *a*. Fraud as against mortgagor's creditors. — A subsequent purchaser of the mortgaged premises, who has purchased with notice of the existence of the mortgage, cannot set up that the note was without consideration, and was given for the purpose of defrauding the mortgagor's creditors, even as against an assignee of the note and mortgage after maturity.[1]

1493. Usury is a defence.[2] — The effect of the illegal rate of interest may be obviated if it can be shown that it was inserted by mistake when the parties intended to provide for the legal rate only.[3] The law governing the contract as to usury is that of the state where it was made, if made in a state other than that in which the mortgaged property is situate.[4] It may be availed of by a wife for the protection of her homestead or of her dower interest, although her husband be estopped by his acts from setting it up as a defence.[5]

If the answer alleges generally that the mortgage contract is usurious without any specific allegation, the defence must be limited to a violation of the statute of the state regarding usury, and its usurious character under any other statute cannot be shown;[6] and such an answer under the systems of pleading and practice generally in vogue would amount to nothing.[7] The answer must allege the usury, and strict proof of the usurious character of the mortgage must be given.[8] After default has been entered, it would seem that it will not be removed to allow this defence except upon special terms.[9]

Whether the defence of usury is a personal privilege of the debtor, or may be taken advantage of by others, is a question upon which the courts are divided in opinion. On the one hand, it is affirmed that any person who has become interested in the property subject to the mortgage, unless he has bought expressly

McConihe *v.* Fales (N. Y.), 14 N. E. Rep. 285.

[1] Blake *v.* Koons (Iowa), 32 N. W. Rep. 379; Crosby *v.* Tanner, 40 Iowa, 136.

[2] §§ **633–663**; De Butts *v.* Bacon, 6 Cranch, 252; Fanning *v.* Dunham, 5 Johns. (N. Y.) Ch. 122; Cowles *v.* Woodruff, 8 Conn. 35; Platt *v.* Robinson, 10 Wis. 128; Fay *v.* Lovejoy, 20 Wis. 407; Cox *v.* Douglas, 12 Iowa, 185; Outten *v.* Grinstead, 4 J. J. Marsh. (Ky.) 608.

[3] See §§ **633–649**; Griffin *v.* N. J. Oil Co. 11 N. J. Eq. (3 Stockt.) 49.

[4] § **657**; Dolman *v.* Cook, 14 N. J. 56.

[5] Campbell *v.* Babcock, 27 Wis. 512.

[6] Atwater *v.* Walker, 16 N. J. Eq. 42.

[7] Mosier *v.* Norton, 83 Ill. 519.

[8] Richards *v.* Worthley, 5 Wis. 73; Munter *v.* Linn, 61 Ala. 492; *S. C.* 2 South. L. J. 205. See Baldwin *v.* Norton, 2 Conn. 161; Wheaton *v.* Voorhis, 53 How. (N. Y.) Pr. 319; Maher *v.* Lanfrom, 86 Ill. 513.

[9] Bard *v.* Fort, 3 Barb. (N. Y.) Ch. 632.

subject to the mortgage, or has assumed the payment of it, may use this defence.[1] Thus a second or other subsequent mortgagee may take this defence.[2]

A judgment creditor of the mortgagor may avail himself of the defence of usury to the extent of his legal lien.[3] Creditors for whose benefit land has been conveyed in trust may set up this defence, though the trustees have neglected to do so.[4] Although a judgment for the full amount of the note and an order for sale have already been entered, subsequent incumbrancers may before final distribution, by answer or cross-petition, set up the defence of usury, and have the proceeds, to the amount of the usurious interest, applied to the payment of their liens.[5]

On the other hand, the weight of authority at the present time favors the rule, that when the debtor is himself willing to abide by the terms of his contract, no one else can interfere and set up the defence of usury.[6] The fact that a usury law does not make void usurious contracts has been held to be decisive in favor of this view.[7]

1494. Usury cannot be set up as a defence by one who has purchased land subject to a mortgage, the amount of which is made part of the consideration of the purchase, whether he has assumed the payment of it or not.[8] When the purchaser sets up

[1] As in **New York**: Post *v.* Dart, 8 Paige, 639; Brooks *v.* Avery, 4 N. Y. 225. **Ohio**: Union Bank at Massillon *v.* Bell, 14 Ohio St. 200. **Mississippi**: M'Alister *v.* Jerman, 32 Miss. 142. **Maryland**: Banks *v.* McClellan, 24 Md. 62. **New Hampshire**: Gunnison *v.* Gregg, 20 N. H. 100. **New Jersey**: Cummins *v.* Wire, 6 N. J. Eq. (2 Halst.) 73. **Nebraska**: Doll *v.* Hollenbeck, 19 Neb. 639.

[2] Greene *v.* Tyler, 39 Pa. St. 361.

[3] Post *v.* Dart, *supra.*

[4] Union Bank at Massillon *v.* Bell, *supra.*

[5] Brooke *v.* Morris, 2 Cin. (Ohio) 528.

[6] **Alabama**: Fielder *v.* Varner, 45 Ala. 429; Cain *v.* Gimon, 36 Ala. 168. **Connecticut**: Loomis *v.* Eaton, 32 Conn. 550. **Illinois**: Adams *v.* Robertson, 37 Ill. 45. **Indiana**: Studabaker *v.* Marquardt, 55 Ind. 341. **Iowa**: Carmichael *v.* Bodfish, 32 Iowa, 418; Huston *v.* Stringham, 21 Iowa, 36; Powell *v.* Hunt, 11 Iowa, 430. **Kansas**: Pritchett *v.* Mitchell, 17 Kans. 355, where the cases are reviewed and collected. **Kentucky**: Campbell *v.* Johnston, 4 Dana, 177, 179. **Michigan**: Farmers' & Mechanics' Bank *v.* Kimmel, 1 Mich. 84. **Missouri**: Ransom *v.* Hays, 39 Mo. 445. **Pennsylvania**: Miners' Trust Co. Bank *v.* Roseberry, 81 Pa. St. 309. Under an earlier statute in this state which made void a usurious contract, it was held that a second mortgagee or other person interested in the equity could set up this defence. Greene *v.* Tyler, 39 Pa. St. 361; Bachdell's Appeal, 56 Pa. St. 386. **Vermont**: Austin *v.* Chittenden, 33 Vt. 553.

[7] Miners' Trust Co Bank *v.* Roseberry, *supra.*

[8] §§ **633, 644, 745**; De Wolf *v.* Johnson, 10 Wheat. 367. **Vermont**: Reed *v.* Eastman, 50 Vt. 67. **New York**: Hartley *v.* Harrison, 24 N.Y. 170; Morris *v.* Floyd, 5 Barb. 130; Sands *v.* Church, 6 N. Y. 347; Mason *v.* Lord, 40 N. Y. 476; Post *v.* Dart, *supra;* Hardin *v.* Hyde, 40 Barb. 435;

this defence, the complainant cannot overcome it by proof that the lands were conveyed to him subject to the mortgage, unless his pleading set forth the execution and terms of the conveyance.[1] But a purchaser who has bought not merely the equity of redemption, but the whole title, paying the full price, with no deduction on account of the mortgage, may set up usury.[2]

A mortgagor who has conveyed the property subject to a mortgage which is usurious, and has afterwards taken a reconveyance in which nothing is said about the mortgage, is entitled to set up the defence of usury.[3] It was suggested that if there had been a personal liability on the part of the intermediate purchaser to pay the mortgage debt, it might not be in his power to release that liability by such a reconveyance without the consent of the mortgagee.

1495. Accordingly a mortgagor may be estopped from setting up the defence of usury. If a mortgage should be made for the purpose of being sold at a discount to some third person, and subsequently assigned at a considerable discount under a promise of the mortgagor that he would make an affidavit to the effect that the consideration of the mortgage was the full amount expressed in it, and that there was no defence or set-off, he would be precluded from contradicting his affidavit if he obtained the money upon the strength of it.[4] And so if a mortgagor, upon the assignment of a mortgage by the mortgagee, signs a certificate stating that the whole principal sum and interest thereon is due without any offset or legal or equitable defence, the mortgagor is estopped from setting up usury.[5] But where part of the money is paid before the giving of the affidavit, the creditor does

Freeman *v.* Auld, 44 N. Y. 50; Merchants' Ex. Nat. Bank *v.* Commercial Warehouse Co. 49 N. Y. 635, 643, note. **Wisconsin**: Thomas *v.* Mitchell, 27 Wis. 414. **Indiana**: Stein *v.* Indianapolis, &c. Asso. 18 Ind. 237; Butler *v.* Myer, 17 Ind. 77; Wright *v.* Bundy, 11 Ind. 398; Price *v.* Pollock, 47 Ind. 362, 366, per Downey, J. **Iowa**: Perry *v.* Kearns, 13 Iowa, 174; Greither *v.* Alexander, 15 Iowa, 470; Huston *v.* Stringham, 21 Ib. 36. **Michigan**: Sellers *v.* Botsford, 11 Mich. 59. **Ohio**: Cramer *v.* Lepper, 26 Ohio St. 59; *S. C.* 20 Am. R. 756. **Maryland**: Hough *v.* Horsey, 36 Md. 181; *S. C.* 11 Am. R. 484. **New Jersey**: Conover *v.* Hobart, 24 N. J. Eq. 120.

When grantee's title is in hostility to the mortgage, see Chamberlain *v.* Dempsey, 9 Bosw. (N. Y.) 212.

[1] Hetfield *v.* Newton, 3 Sandf. (N. Y) Ch. 564.

[2] Lilienthal *v.* Champion, 58 Ga. 158; Maher *v.* Lanfrom, 86 Ill. 513.

[3] Knickerbocker Life Ins. Co. *v.* Nelson, 13 Hun (N. Y.), 321; affirmed, 7 Abb. N. C. 170.

[4] Real Estate Trust Co. *v.* Rader, 53 How. (N. Y.) Pr. 231.

[5] Smyth *v.* Lombardo, 15 Hun (N. Y.), 415.

not, in paying it, act upon the statements contained in the affidavit, and therefore the mortgagor is not estopped from asserting the usurious nature of the transaction so far as the amount then paid is concerned. That the creditor believes that an estoppel will be made in the future avails nothing.[1]

1496. Set-off. — Upon a bill to foreclose, the mortgagor is allowed to set off a debt due to him from the complainant, not only in cases where this would be allowed in actions at law,[2] but also in cases of peculiar equity not strictly within the rules of law ;[3] as, for instance, in an action against a mortgagor and his surety on a bond secured by the mortgage, a debt due the mortgagor from the plaintiff may be allowed in set-off. The joint bond in such case is nothing more than a security for the separate debt of the mortgagor. The mortgage is executed by him alone, and is a lien upon his land, and his interests alone are affected by the foreclosure. That a joint judgment might be rendered on the bond for any deficiency does not exclude the allowance of the counter-claim.[4] The defendant cannot make a counter-claim and demand judgment upon it, unless the plaintiff is personally liable to him. His counter-claim must in some way go to qualify or defeat the plaintiff's demand.[5]

To entitle the defendant to set off a debt, it must have been due to him from the plaintiff at the time the foreclosure suit was commenced.[6] Generally a claim for unliquidated damages cannot be set off when the defendant has an adequate remedy at law ;[7] but under the codes of practice in some states such a claim may be allowed.[8]

[1] Payne *v.* Burnham, 62 N. Y. 69.

[2] **York New**: National F. Ins. Co. *v.* McKay, 21 N. Y. 191, 196; Irving *v.* De Kay, 10 Paige, 319; Chapman *v.* Robertson, 6 Paige, 627; Holden *v.* Gilbert, 7 Paige 208; Hunt *v.* Chapman, 51 N. Y. 555. **Michigan**: Hess *v.* Final, 32 Mich. 515; Lockwood *v.* Beckwith, 6 Mich. 168. **Alabama**: Gafford *v.* Proskauer, 59 Ala. 264.

In earlier cases it was held that the defendant could not set off a demand, but must resort to a cross-bill. Troup *v.* Haight, Hopk. (N. Y.) 239.

A shareholder and mortgagor in a building association may set off claims held by him against it, in release of his mortgage debt. Hennighausen *v.* Tischer, 50 Md. 583.

[3] Goodwin *v.* Keney, 49 Conn. 563.

[4] *Ex parte* Hanson, 12 Ves. 346; Bathgate *v.* Haskin, 59 N. Y. 533; Holbrook *v.* Am. F. Ins. Co. 6 Paige (N. Y.), 220.

[5] Lathrop *v.* Godfrey, 3 Hun (N. Y.), 739; *S. C.* 6 Thomp. & C. 96; National F. Ins. Co. *v.* McKay, *supra.*

[6] Holden *v.* Gilbert, *supra;* Knapp *v.* Burnham, 11 Ib. 330; Thompson *v.* Ellsworth, 1 Barb. (N. Y.) Ch. 624.

[7] Gafford *v.* Proskauer, *supra;* Cleaver *v.* Mathews (Va.), 3 S. E. Rep. 439.

[8] Hattier *v.* Etinaud, 2 Desau. (S. C.) 570.

1497. If the suit to foreclose be brought in the name of a person other than the real owner of the mortgage note, the defendant may have the benefit of any defence or set-off he has against the real owner. No other defence can be set up on the ground that the holder of the mortgage security is prosecuting the foreclosure for the benefit of another person.[1]

1498. In New Jersey, however, a foreclosure suit is regarded as so far a proceeding *in rem* as to exclude the defence of set-off. Nothing can be set up in such suit, by way of satisfaction of the mortgage, in whole or in part, except payment. There must either have been a direct payment of part of the debt, or an agreement that the sum proposed to be offset should be received and credited as payment;[2] because, if there was no actual appropriation by the debtor at or before the time of payment, the creditor may apply the payment to any other claim he has at his discretion.[3] An independent claim of the mortgagor cannot be set off.[4] A payment on account of the mortgage debt is not a cause of action, which must be pleaded as a counter-claim to entitle the defendant to prove it. An answer of payment in full or in part is sufficient.[5] A mortgagor may avail himself by answer and set off of rents received by the mortgagee in possession.[6]

A mortgage to secure future advances is valid only to the amount of the advances actually made; but the mortgagee's failure to complete the contemplated advances affords ground for only nominal damages by way of set-off;[7] unless, perhaps, there was an express obligation to make them. Under a covenant by the mortgagee to make partial releases, damages sustained by his refusal to release may be a matter of equitable offset to his claim upon the mortgage.[8]

1499. Illegal interest previously paid upon the mortgage or

[1] Spear *v.* Hadden, 31 Mich. 265; Lathrop *v.* Godfrey, 3 Hun (N. Y.), 729; Chase *v.* Brown, 32 Mich. 225.

[2] Parker *v.* Hartt, 32 N. J. Eq. 235; Vanatta *v.* N. J. Mut. L. Ins. Co. 31 Ib. 17; Williamson *v.* Fox, 30 N. J. Eq. 488; Dudley *v.* Bergen, 23 N. J. Eq. 397; Dolman *v.* Cook, 14 N. J. Eq. 56; Conaway *v.* Carpenter, 58 Ind. 477.

It is provided by statute in New Jersey that an assignee of a mortgage may avail himself of all just set-offs and defences which would have been allowed if his assignor had brought the action. R. S. 1877, p. 708, § 31; Woodruff *v.* Morristown Inst. for Savings, 34 N. J. Eq. 174.

[3] Bird *v.* Davis, 14 N. J. Eq. 467.

[4] White *v.* Williams, 3 N. J. Eq. (2 Green) 376; Barnes *v.* Moore, 63 Ga. 164.

[5] Hendrix *v.* Gore, 8 Oreg. 406.

[6] Krueger *v.* Ferry, 41 N. J. Eq. 432.

[7] Dart *v.* McAdam, 27 Barb. (N. Y.) 187.

[8] Warner *v.* Gouverneur, 1 Barb. (N. Y.) 36.

included in it may be offset,[1] as also may be a payment of a bonus in addition to the lawful interest paid to procure an extension of time within which to pay the debt.[2]

1500. It is no defence to a foreclosure suit on a purchase money mortgage that there is an outstanding paramount title or incumbrance when there has been no actual eviction. The mortgagor is left to his remedy on the covenant.[3]

A defence to the foreclosure of a purchase money mortgage, alleged to have existed at the time of its inception, can only arise when fraud has been practised by the mortgagee in procuring its execution, or there has been a failure of consideration.[4]

If, however, the mortgagor has been evicted, or, according to some authorities, if an ejectment suit has been commenced against him on such outstanding title, the court will interfere.[5] In the latter case proceedings upon the mortgage, even if it be a power of sale mortgage not requiring a suit, will be enjoined until the action of ejectment is determined.[6] Although there is an objection to undertaking a settlement of unliquidated damages in a court of equity, yet this may be done either by directing an issue, or by a reference to a master to ascertain the damages, before entering a decree upon the mortgage; or the court may avoid this objection by staying the foreclosure suit until the damages arising from the failure of title are ascertained in a suit at law.[7]

The same rule applies to a bill to enforce a lien for purchase money. "The rule," says Mr. Justice Swayne of the Supreme Court,[8] "is founded in reason and justice. A different result

[1] § 648; Pond *v.* Causdell, 23 N. J. Eq. 181; Harbison *v.* Houghton, 41 Ill. 522; Ward *v.* Sharp, 115 Vt. 15; Havens *v.* Jones, 45 Mich. 253.

[2] Real Estate Trust Co. *v.* Keech, 7 Hun (N. Y.), 253; McGregor *v.* Mueller, 1 Cin. (Ohio) 486.

[3] McConihe *v.* Fales (N. Y.), 14 N. E. Rep. 285; Abbott *v.* Allen, 2 Johns. Ch. (N. Y.) 519; York *v.* Allen, 30 N. Y. 104; Peters *v.* Bowman, 98 U. S. 56; Lessly *v.* Bowie (S. C.), 3 S. E. Rep. 199; Alden *v.* Pryal, 60 Cal. 215.

[4] McConihe *v.* Fales, *supra*, per Ruger, C. J.

[5] Price *v.* Lawton, 27 N. J. Eq. 325; Glenn *v.* Whipple, 12 N. J. Eq. 50; Van Waggoner *v.* McEwen, 2 N. J. Eq. 412; Shannon *v.* Marselis, 1 N. J. Eq. 413; Withers *v.* Morrell, 3 Edw. N. Y. 560; Ryerson *v.* Willis, 81 N. Y. 277; Taylor *v.* Whitmore, 35 Mich. 97. Whether there can be any defence by way of recoupment, before eviction, was questioned in Church *v.* Fisher, 40 Ind. 145.

[6] Johnson *v.* Gere, 2 Johns. (N. Y.) Ch. 546; Edwards *v.* Bodine, 26 Wend. (N. Y.) 109. See, however, to the contrary, Peat *v.* Gilchrist, 3 Sandf. (N. Y.) Sup. Ct. 118, and cases cited.

[7] Coster *v.* Monroe Manuf. Co. 2 N. J. Eq. (1 Gr.) 467; Couse *v.* Boyles, 4 N. J. Eq. (3 Gr.) 212.

[8] Peters *v.* Bowman, 98 U. S. 56; *S. C.* 11 Chicago L. N. 118; 7 Wash. L. R. 156.

would subvert the contract of the parties and substitute for it one which they did not make. In such cases the vendor by his covenants, if there be such, agrees upon them, and not otherwise, to be responsible for defects of title. If there are no covenants, he assumes no responsibility and the other party takes the risk. The vendee agrees to pay according to his contract, and secures payment by giving a lien upon the property. Here it is neither expressed nor implied that he may refuse to pay and remain in possession of the premises; nor that the vendor shall be liable otherwise than according to his contract."

1501. This defence is founded on the covenants. An answer to a suit to foreclose a mortgage given for the purchase money, which alleges a failure of title, must, in the absence of any allegation of fraud, either set out the deed or the covenants contained in it;[1] because the defence is founded on the covenants of warranty or seisin. Therefore, where the deed contains no such covenants, as in the case of a deed made by executors, containing no covenants except against the acts of themselves and their testator, it is no defence that a portion of the property was covered by an incumbrance not specified in the covenant.[2] The existence of a lease upon part of the premises is no defence to a suit to foreclose the purchaser's mortgage, if it is no breach of any of the covenants of his deed, and his grantor did not fraudulently mislead him.[3]

No covenant will be implied in such a mortgage.[4]

1502. If the mortgagor is in undisturbed possession, and no suit is pending for the possession of the property by an adverse claimant, the courts will not generally interfere to restrain the vendor from foreclosing a mortgage given for the price of land conveyed with full covenants of warranty, on account of any alleged defects in the title not amounting to a total failure of consideration, unless there was fraud in the sale.[5] Nor will they

[1] Church *v.* Fisher, 40 Ind. 145; and see Davis *v.* Bean, 114 Mass. 358, 360.

[2] Niles *v.* Harmon, 80 Ill. 396; Barry *v.* Guild (Ill.), 18 N. E. Rep. 759; Sandford *v.* Travers, 40 N. Y. 140.

[3] Sandford *v.* Travers, 7 Bosw. (N. Y.) 498.

[4] Brown *v.* Phillips, 40 Mich. 264.

[5] **New York**: Leggett *v.* M'Carty, 3 Edw. 124; Withers *v.* Morrell, Ib. 560; Edwards *v.* Bodine, 26 Wend. 109; Tallmadge *v.* Wallis, 25 Ib. 107; Davison *v.* De Freest, 3 Sandf. Ch. 456; Banks *v.* Walker, 3 Barb. Ch. 438; York *v.* Allen, 30 N. Y. 104; Curtiss *v.* Bush, 39 Barb. 661; Sandford *v.* Travers, *supra;* Bumpus *v.* Platner, 1 Johns. Ch. 213, 218; Abbott *v.* Allen, 2 Ib. 519; Chesterman *v.* Gardner, 5 Ib. 29; Denston *v.* Morris, 2 Edw. 37; Burke *v.* Nichols, 21 How. Pr. 459; *S. C.* 34 Barb. 430; 2 Keyes, 670; Miller *v.* Avery, 2 Barb. Ch. 582; Parkin-

allow a counter-claim on account of an outstanding incumbrance, unless the mortgagor has paid such incumbrance in whole or in part, or has lost the land in whole or in part under such incumbrance.[1] Before this defence will avail, there must be either an eviction or something tantamount to it.[2]

It is not always necessary that the purchaser should show that he has been dispossessed to establish eviction; it may be established by proof that at the time of his purchase the lands were in the actual possession of one claiming under a title hostile to his vendor, by reason of which he had not and could not obtain possession.[3] Neither is it necessary that he should resist the claim under the paramount title, or even await eviction by legal process. He may voluntarily surrender possession; but then must stand ready to show that the title to which he surrendered was paramount, and was covered by his grantor's covenants of warranty.[4] If a judgment for the possession of the property be recovered against him, his delivery of possession, without awaiting expulsion by legal process, is an eviction.[5] The mortgagor may safely pay the adverse claimant with the consent of his mortgagee that

son *v.* Jacobson, 13 Hun, 317; Parkinson *v.* Sherman, 74 N. Y. 88; Ryerson *v.* Willis, 81 N. Y. 277. **New Jersey**: Hile *v.* Davison, 20 N. J. Eq. 228; Hulfish *v.* O'Brien, Ib. 230; Shannon *v.* Marselis, 1 N. J. Eq. 413, 426; Van Waggoner *v.* McEwen, 2 N. J. Eq. 412; Glenn *v.* Whipple, 12 N. J. Eq. 50; Miller *v.* Gregory, 16 N. J. Eq. 274. **Missouri**: Key *v.* Jennings, 66 Mo. 356, 368. **Michigan**: Smith *v.* Fiting, 27 Mich. 148. **Vermont**: Darling *v.* Osborne, 51 Vt. 148. **Georgia**: Byrd *v.* Turpin, 62 Ga. 591. **Indiana**: Stahl *v.* Hammontree, 72 Ind. 103; Mahoney *v.* Robbins, 49 Ind. 147; Douglass *v.* Thomas, 103 Ind. 187, 188. **South Carolina**: Childs *v.* Alexander, 22 S. C. 169, 185; Whitworth *v.* Stuckey, 1 Rich. Eq. 404, 410; Van Lew *v.* Parr, 2 Rich. Eq. 321, 350; Lessly *v.* Bowie, 3 S. E. Rep. 199.

Mr. Justice Nelson, in Patton *v.* Taylor, 7 How. 132, 159, referring to several authorities there cited, said: "These cases will show that a purchaser, in the undisturbed possession of the land, will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation; and that, in such a case, he must seek his remedy at law on the covenants in his deed. That if there is no fraud, and no covenants to secure the title, he is without remedy; as the vendor, selling in good faith, is not responsible for the goodness of his title, beyond the extent of his covenants in the deed." This doctrine is affirmed in Noonan *v.* Lee, 2 Black, 499, 508; Peters *v.* Bowman, 98 U. S. 56; *S. C.* 11 Chicago L. N. 118; and is sustained also in Hill *v.* Butler, 6 Ohio St. 207, where numerous cases are cited. See § **1355**, near end.

[1] Evans *v.* McLucas, 12 S. C. 56.

[2] Platt *v.* Gilchrist, 3 Sandf. (N. Y.) Sup. Ct. 118. In this case the earlier cases are reviewed at length.

[3] Withers *v.* Powers, 2 Sandf. (N. Y.) Ch. 350.

[4] York *v.* Allen, 30 N. Y. 104; Cowdrey *v.* Coit, 44 N. Y. 382, 392, per Gray, Com'r; Simers *v.* Saltus, 3 Den. (N. Y.) 214.

[5] Dyett *v.* Pendleton, 8 Cow. (N. Y.) 727.

the amount may be applied in reduction of the mortgage debt, if he obtain sufficient evidence of such consent.[1]

The defence of eviction cannot be set up by one who has merely purchased the equity of redemption subject to the mortgage, without assuming any personal liability for it, or against whom no personal claim is made, merely upon the ground that he is the assignee of the plaintiff's covenants.[2] Eviction is no defence when no right or title to the part of the land from which the mortgagor is evicted was conveyed to him; as where a building and fence, not specified in the deed, encroached on an adjoining lot.[3]

1503. Cases exceptional to general rule. — The rule generally is that above stated, that the entire want of title in the vendor, or the partial failure of it, is no defence to the action, unless fraud be shown or the mortgagor has been evicted.[4] Yet it has been held by several courts that the mortgagor may defend by a recoupment or offset of damages for a breach of the covenants in the deed to him, to the extent of the damages sustained, if these are determined so that they may be deducted, whether the failure of title be complete or partial.[5] A breach of covenant in the vendor's deed is a defence, where it is shown that the vendor is unable to respond to the damages occasioned by the breach.[6] When a remedy upon the covenants would be ineffectual, as, for instance, when the mortgagee is insolvent, the defendant, in a suit upon the note or mortgage, may set up the damages on the covenants.[7]

1504. When the covenant is broken at the time the suit is brought to recover the purchase money, and the amount claimed under it is certain, the purchaser is entitled to detain the

[1] Hart *v.* Carpenter, 36 Mich. 402. After the death of the mortgagee there may be difficulty in proving his oral admissions.

[2] National F. Ins. Co. *v.* McKay, 21 N. Y. 191; Van Houten *v.* McCarty, 4 N. J. Eq. (3 Green) 141; Brou *v.* Becnel, 20 La. Ann. 254; and see Sandford *v.* Travers, 40 N. Y. 140.

[3] Burke *v.* Nichols, 1 Abb. (N. Y.) App. Dec. 260; *S. C.* 2 Keyes, 670.

[4] **Wisconsin**: Booth *v.* Ryan, 31 Wis. 5. **Arkansas**: Robards *v.* Cooper, 16 Ark. 288. **Indiana**: Conwell *v.* Clifford, 5 Ind. 392; Rogers *v.* Place, 29 Ind. 577; Jordan *v.* Blackmore, 20 Ind. 419; Buell *v.* Tate, 7 Blackf. 55; Hume *v.* Dessar, 29 Ind. 112; Hubbard *v.* Chappel, 14 Ind. 601; Hanna *v.* Shields, 34 Ind. 84; Plowman *v.* Shidler, 36 Ind. 484, Conklin *v.* Bowman, 7 Ind. 533; Church *v.* Fisher, 40 Ind. 145.

[5] Coy *v.* Downie, 14 Fla. 544; Lowry *v.* Hurd, 7 Minn. 356; Walker *v.* Wilson, 13 Wis. 522; Hall *v.* Gale, 14 Wis. 54; Mendenhall *v.* Steckel, 47 Md. 453; Scantlin *v.* Allison, 12 Kans. 85; Chambers *v.* Cox, 23 Kans. 393; Kelly *v.* Kershaw (Utah.), 14 Pac. Rep. 804.

[6] McLemore *v.* Mabson, 20 Ala. 137.

[7] Knapp *v.* Lee, 3 Pick. (Mass.) 452.

purchase money to the extent to which he would at that time be entitled to recover damages upon the covenant, in order to avoid circuity of action. It is therefore held that a breach of the covenant of seisin in the vendor's deed may be set up as a defence to an action for the foreclosure of a mortgage given for the purchase money, although a breach of the covenant of warranty may not.[1] A total failure of title is a total failure of consideration. The obligation of the mortgagor is not made for a covenant of the mortgagee, but for the land; and if the land fails to pass, the promise of the mortgagor is a mere *nudum pactum.* The damages in an action on the covenant would be the same as the consideration for the promise; and it is just that the mortgagor should be allowed to show a total failure of consideration instead of being compelled to seek his remedy on the covenants.[2]

A covenant against incumbrances is broken at the time of the conveyance if a third person then had an interest in the land granted which diminished the value of the absolute interest in the same, while at the same time the fee passed by the deed. If an incumbrance upon land conveyed to the grantee by deed containing such a covenant be fixed and capable of deduction out of the grantee's purchase money mortgage, a suit upon such mortgage is by some courts allowed to proceed to judgment, when the amount of the incumbrance may be offset against the amount of the mortgage; and if a sale be had, the proceeds will be applied in the first place to discharge the incumbrance, and the amount so applied deducted from the mortgage debt.[3] But in other courts, and more generally, it is held that unless the defendant has been at cost to extinguish the incumbrance, or has suffered

[1] Latham *v.* McCann, 2 Neb. 276. The court say: "The parties in this case, as in every other case, must be bound by the bargain they have chosen to enter into. The grantee might have demanded a covenant of seisin, — the assurance that the grantor had at the time of making his deed the very estate, both as to quantity and quality, that he professed to convey. In such case, a failure of title to the land might be interposed in an action on the mortgage. Rice *v.* Goddard, 14 Pick. (Mass.) 293; Tallmadge *v.* Wallis, 25 Wend. (N. Y.) 107. So might he have reserved a portion of the purchase money, by agreement, to await the clearing up of any suspicion on the title; but he chose, for some reason, to accept a deed with covenants of warranty. He cannot now come forward and say he will pay his note and mortgage upon certain alleged defects being remedied."

[2] Rice *v.* Goddard, *supra;* Wilber *v.* Buchanan, 85 Ind. 42.

[3] § **1698**, last clause; and see Smith *v.* Fiting, 37 Mich. 148, 151, per Marston, J.; Coffman *v.* Scoville, 86 Ill. 300; Patterson *v.* Sweet, 3 Bradw. (Ill.) 550.

through its enforcement, he can be allowed only nominal damages.[1]

The possession of a third person, without right and without the consent of the grantor, does not constitute an incumbrance, or a breach of a covenant in the grantor's deed against incumbrances; consequently the purchaser who has given a mortgage for a portion of the purchase money cannot charge the mortgagee with rent, or for damages equal to rent, for the period during which such third person has held possession.[2] Thus it is held that if there be a breach of the covenant against incumbrances by reason of the existence of tax liens, the amount of these would be a proper offset to the amount due on the mortgage.[3] But if for any reason a decree cannot be made for the mortgagee directing a deduction of the amount due on the prior incumbrances against which the mortgagor is protected by the covenant, as, for instance, when such incumbrances exceed the amount of the mortgage, the foreclosure suit upon the latter will be stayed until the property has been released from such incumbrances.[4] A provision in the purchase money mortgage for a release from a prior mortgage on the mortgagor's paying certain sums does not form an exception to the rule, that the grantor who has conveyed by deed having the usual covenants, including a covenant against incumbrances, must procure a release from such prior mortgage before he is entitled to a decree of foreclosure on the purchase money mortgage.[5]

1505. The breach by the mortgagee of an independent covenant is no defence to the foreclosure of a mortgage which by its terms has become due and payable. Where, for instance, a mortgage is given in part payment of the purchase money of the premises, and at the same time the mortgagee executes a covenant to the purchaser that he will immediately procure releases of their title from certain persons named, who are reputed to have some claim upon the lands, the covenant is not dependent upon the payment of the mortgage money, and does not consti-

[1] Evans *v.* McLucas, 12 S. C. 56; Delavergne *v.* Norris, 7 Johns. (N. Y.) 358; Prescott *v.* Trueman, 4 Mass. 627; M'Crady *v.* Brisbane, 1 N. & M. (S. C.) 104.

[2] Dinsmore *v.* Savage, 68 Me. 191.

[3] Union Nat. Bank of Rahway *v.* Pinner, 25 N. J. Eq. 495; White *v.* Stretch, 2 N. J. Eq. 76; Van Riper *v.* Williams, 2 N. J. Eq. (1 Gr.) 407.

[4] Dayton *v.* Dusenbury, 25 N. J. Eq. 110.

[5] Stiger *v.* Bacon, 29 N. J. Eq. 442.

tute, with the mortgage, a condition that the mortgage shall be paid when the releases shall be procured.[1]

1506. But if the sale was effected by the vendor's fraud, as by fraudulently procuring and exhibiting as true a false abstract of title, the purchaser may have the mortgage and the conveyance rescinded.[2] Fraud is defence only when it was practised upon the defendant by the mortgagee or his agents, or with his knowledge.[3] The mortgagor may also set up a counter-claim for damages occasioned by the fraud practised by the mortgagee in the sale of the premises to the mortgagor;[4] such as a misrepresentation as to the amount of the land;[5] and if such damages exceed or equal the amount of the mortgage, the claim under the mortgage will be wholly defeated.[6]

But fraud in the sale of one of several tracts of land under one contract, but conveyed by separate deeds, cannot be set up as a defence in a suit to foreclose a purchase money mortgage upon another of such tracts.[7]

A mere mistake of both parties as to the number of acres of land conveyed is no ground for defence to a mortgage given for the purchase money, there being no fraud or misrepresentation by the grantor.[8] But it would seem that a misrepresentation by the grantor, though made under a mistake as to his own rights, but acted upon by the purchaser, may be ground for relief in respect

[1] Coursen *v.* Canfield, 21 N. J. Eq. 92. "The mortgagee," said the Chancellor, "has a right to say *in hæc fœdera non veni.* He might have been willing to bind himself in a covenant to procure releases which he knew were of little or no importance, a breach of which, if he should be unable to procure them, would subject him to small damages; but he might be unwilling to bind himself to forfeit $2,500 of the purchase money if he could not obtain the releases. The parties could have made the bargain either way. They chose to make, and did make, independent covenants. And there is no principle established in courts of equity by which an effect will be given to such covenants different from their legal effect, and independent covenants turned into conditional, because it will give better protection to a party, or will diminish litigation." And see Duryee *v.* Linsheimer, 27 N. J. Eq. 366.

[2] Booth *v.* Ryan, 31 Wis. 45; Robards *v.* Cooper, 16 Ark. 288; Furman *v.* Meeker, 24 N. J. Eq. 110.

[3] Aikin *v.* Morris, 2 Barb. (N. Y.) Ch. 140.

[4] Allen *v.* Shackelton, 15 Ohio St. 145. The fraud alleged in this case was a misrepresentation of the boundaries of the lot, and the property covered by the mortgage.

[5] Dayton *v.* Melick, 32 N. J. Eq. 570; *S. C.* 27 Ib. 362.

[6] Grant *v.* Tallman, 20 N. Y. 191; Lathrop *v.* Godfrey, 6 Thomp. & C. 96; *S. C.* 3 Hun, 739.

[7] Hicks *v.* Jennings (C. C. Ga. 1880), 4 Fed. Rep. 855.

[8] Northrop *v.* Sumney, 27 Barb. (N. Y.) 196; Clark *v.* Davis, 32 N. J. Eq. 530; Dresbach *v.* Stein, 41 Ohio St. 70.

to a mortgage given to the grantor for the purchase money.[1] But a purchaser who has assumed an existing mortgage cannot set up in defence to a foreclosure suit upon it that his grantor misstated the number of acres conveyed, and that the mortgagee, when he sold the land to such vendor, made a similar misstatement; for the purchaser and mortgagee are not in such case privies in contract.[2]

1507. An assignee of a mortgage not due is not subject to this defence. Failure of title to a part of the premises for the purchase money of which the mortgage was given is no defence to an action by an assignee of the mortgage, who purchased it before due, and without notice of such failure.[3] And as already stated such defence would not, generally, avail against the original mortgagee, for the mortgagor's remedy would be on the covenants of the deed of purchase; but when the defence may be taken, the defendant may show that the assignment of the mortgage was colorable only, and that the mortgagee is still the equitable owner.[4]

1508. Validity of title may be made a condition precedent to the payment of the mortgage. Where the mortgage and note are conditioned that the note shall not be deemed due and payable until the title of the grantor, which was known to be defective as to a portion of the premises, is perfected, the mortgagor may set up the non-performance of this condition as a defence, and be allowed the value of that portion of the property in set-off; but he should be required at the same time to release whatever title he may have acquired to it by his deed.[5] A mortgage for purchase money has been regarded as conditional upon the title, even when the condition is not expressed. And so where a mortgage was given of one tract of land to secure the purchase money of another tract, which the mortgagee covenanted by his bond to convey with covenants of warranty, in an action to foreclose the mortgage the failure of title in the vendor was declared a good defence, on the ground that the mortgagor only undertook to pay the mortgage on the condition that the mortgagee had title to the tract he agreed to convey.[6]

[1] Champlin *v.* Laytin 6 Paige (N. Y.), 189; affirmed, 18 Wend. 407. See Heath v. Pratt, 51 Vt. 238.

[2] Davis *v.* Clark, 33 N. J. Eq. 579; Clark *v.* Davis, 32 N. J. Eq. 530.

[3] §§ 834–847; Stilwell *v.* Kellogg, 14 Wis. 461.

[4] Lathrop *v.* Godfrey, 3 Hun (N.Y.), 739.

[5] Weaver *v.* Wilson, 48 Ill. 125.

[6] Smith *v.* Newton, 38 Ill. 230.

1509. Statute of limitations. — But the fact that the debt secured by the mortgage is barred by the statute of limitations is no defence to a bill to foreclose it.[1] In a few states, however, when an action on the note is barred, the remedy on the mortgage is gone. Distinct remedies may be pursued, but the same limitation applies to both.[2] Moreover, it is held that purchasers from the mortgagor subsequent to the execution of the mortgage may plead the statute of limitations as a defence to an action commenced after the statute has run against the debt secured.[3]

1510. Insanity of mortgagor. — If the sanity of the mortgagor is questioned, the burden is upon the defendant to show it; and he must show not merely an incapacity to make a valid contract at the date of its execution, but that the mortgagee knew and took advantage of the grantor's state of mind; otherwise, the consideration being paid, the security will be held good for the amount, although the insanity of the mortgagor be admitted or proved.

The mortgage deed must at the hearing be admitted or proved. If there is an attesting witness, the only question that need be asked of him is whether the mortgagor executed the deed in the witness's presence. It is not necessary, as in the case of a will, to prove that the person when he executed it was of sound mind. Although he has been found insane by an inquisition of lunacy, it is not the duty of the plaintiff to do more than prove the execution of the deed. The defendant must bring forward his own case to have the deed set aside, and the burden of proof lies on his side.[4]

1511. A recovery of judgment on the mortgage note or bond is no defence;[5] on the contrary, such judgment may be relied upon as establishing the validity of the note or bond, and of the mortgage so far as the debt is concerned.[6] Neither is the

[1] See § **1204**. The effect of the statute of limitations is there fully examined. See, also, Haskell *v.* Bailey, 22 Conn. 569, 573; Michigan Ins. Co. *v.* Brown, 11 Mich. 265.

[2] Coster *v.* Brown, 23 Cal. 142; Heinlin *v.* Castro, 22 Cal. 100; McCarthy *v.* White, 21 Cal. 495; Lord *v.* Morris, 18 Cal. 482. When there is no written obligation for the debt, see Union Water Co. *v.* Murphy's Flat Fluming Co. 22 Cal. 620.

[3] McCarthy *v.* White, *supra;* Grattan *v.* Wiggins, 23 Cal. 16; Low *v.* Allen, 26 Cal. 141; Lent *v.* Shear, 26 Cal. 361.

[4] Jacobs *v.* Richards, 18 Beav. 300.

[5] § **936**; Vansant *v.* Allmon, 23 Ill. 30; Jenkinson *v.* Ewing, 17 Ind. 505; Severson *v.* Moore, 17 Ind. 231; Goenen *v.* Schroeder, 18 Minn. 66.

[6] Hosford *v.* Nichols, 1 Paige (N. Y.), 220; Morris *v.* Floyd, 5 Barb. (N. Y.) 130; Clarke *v.* Bancroft, 13 Iowa, 320. See Batchelder *v.* Taylor, 11 N. H. 129.

pendency of a suit at law upon the mortgage debt any defence to a suit to foreclose the mortgage, unless made so by statute.[1] Of course a satisfaction of a judgment upon the debt would be a defence.[2] Under the Code of New York and the codes of some other states following that, proceedings in an action at law are suspended by a foreclosure suit;[3] and if judgment has been obtained at law, the remedy upon that must be first exhausted.[4]

1511 *a*. The defendant may set up his liability to a creditor of the plaintiff in a garnishee or trustee process. But to a foreclosure suit brought by the assignee of a mortgage, it is no sufficient answer for the defendant to say that he is liable for the debt as garnishee in an action against the mortgagee, though he knew of the assignment of the mortgage to the plaintiff before he answered the garnishee process. Neither has the defendant any right to answer that the assignment is colorable, collusive, or fraudulent, as this is a matter which does not concern him.[5]

1512. If the defendant sets up satisfaction of the mortgage, he must clearly set out the defence in his answer, and his proofs must clearly substantiate his answer; and if both answer and the testimony be vague and uncertain the defence will fail.[6] Payment in whole or in part, when properly set up and proved, is a good defence, not only for the mortgagor, but for junior incumbrancers.[7] But a mortgagor who has not paid the mortgage debt cannot set up a release executed by one who had no authority at the time to execute it.[8] It is a good answer to a foreclosure suit that the debt for the security of which the mortgage was given was an advancement or gift, and that accordingly the deed and note had been left with the mortgagor.[9] The defence that the complainant has received a piece of property, which should be

[1] Suydam *v.* Bartle, 9 Paige (N. Y.), 294; Williamson *v.* Champlin, Clarke (N. Y.), 9; Tappan *v.* Evans, 11 N. H. 311; Guest *v.* Byington, 14 Iowa, 30.

[2] Farmers' Loan & Trust Co. *v.* Reid, 3 Edw. (N. Y.) 414.

[3] Williamson *v.* Champlin, *supra*.

[4] Shufelt *v.* Shufelt, 9 Paige (N. Y.), 137; North River Bank *v.* Rogers, 8 Paige (N. Y.), 648.

[5] Phipps *v.* Rieley (Oregon), 16 Pac. Rep. 185.

[6] Suhr *v.* Ellsworth, 29 Mich. 57; Finayson *v.* Lipscomb, 16 Fla. 751; Richardson *v.* Tolman, 44 Mich. 379; Cameron *v.* Culkins, 44 Mich. 531.

In **Pennsylvania**, where this defence is set up in an action of *scire facias sur* mortgage, the court may leave the question of payment, as one of fact, to the jury. German Ins. Co. *v.* Davenport, 9 Atl. Rep. 517.

[7] Prouty *v.* Eaton, 41 Barb. (N. Y.) 409; Prouty *v.* Rice, 50 Barb. (N. Y.) 344. See Edwards *v.* Thompson, 71 N. C. 177; Johnson *v.* Van Velsor, 43 Mich. 208; Hendrix *v.* Gore, 8 Oreg. 406.

[8] Jennings *v.* Hunt, 6 Bradw. (Ill.) 523.

[9] Peabody *v.* Peabody, 59 Ind. 556.

applied on the mortgage debt, may be taken by answer without filing a cross-bill.[1]

An agreement made by the holders of the notes of a corporation, secured by mortgage, to convert the notes into stock upon a condition which has failed, is no defence to a suit to foreclose the mortgage.[2]

Where the defences to a foreclosure suit are the invalidity of the mortgage, and also payment of the mortgage debt, it is error for the court, after deciding the first point in favor of the defendant, to refuse to pass upon the second, since a money judgment could be rendered for the debt if unpaid.[3]

1513. An agreement by the parties subsequent to the mortgage by which the rents of the mortgaged premises are assigned to the mortgagee to be collected by him, and applied to the debt until it is fully paid, is a good defence to a suit to foreclose;[4] and so is an agreement to rescind a sale of land, the purchase money of which the mortgage was given to secure, by which the land is to be reconveyed and the mortgage surrendered;[5] or an agreement to extend the time of payment,[6] when made for a valuable consideration.[7] An agreement extending the time of payment is no part of the mortgage, and does not draw the mortgage within an act forbidding the foreclosure of a mortgage until one year after the last instalment is due.[8]

1514. As a general rule, a defendant cannot object to an insufficient service, or the want of service, upon another defendant who is not a necessary party to the suit.[9] Of course a defendant may take advantage of want of service, or of an ineffectual service, upon himself by a special appearance and plea in the suit; or he may in such case take no notice of the suit, as he would not be bound by the decree. A decree, however, which recites that process was duly served upon a defendant is *primâ facie*, if not conclusive, proof of notice to him of the foreclosure suit.[10] It has been held, however, that a person who stands in

[1] Edgerton *v.* Young, 43 Ill. 464.

[2] Pugh *v.* Fairmount Mining Co. 112 U. S. 238.

[3] Gleaton *v.* Gibson (S. C.), 7 S. E. Rep. 833.

[4] Angier *v.* Masterson, 6 Cal. 61; Ford *v.* Smith, 60 Wis. 222.

[5] Bledsoe *v.* Rader, 30 Ind. 354.

[6] Dodge *v.* Crandall, 30 N. Y. 294; Andrews *v.* Gillespie, 47 N. Y. 487.

[7] Trayser *v.* Ind. Asbury University, 39 Ind. 556; Tompkins *v.* Tompkins, 21 N. J. Eq. 338; Maryott *v.* Renton, Ib. 381.

[8] Wallace *v.* Hussey, 63 Pa. St. 24.

[9] Mims *v.* Mims, 35 Ala. 23; Semple *v.* Lee, 13 Iowa, 304.

[10] Carpenter *v.* Millard, 38 Vt. 9.

the relation of surety for the mortgage debt, and whose right it is to have the entire equity of redemption applied in the first place to the payment of it, may require the bringing in of parties having an interest in it, so as to make the sale perfect against all equities.[1]

1515. Bill of interpleader. — If the defendant, admitting the indebtedness, is in doubt to which of two claimants he ought to pay it, he should make his answer a bill of interpleader, placing himself indifferently between them.[2]

The mortgagor cannot set up by cross-bill the defence that the notes secured by the mortgage were improperly made payable to one of two partners who has misappropriated the funds of the firm, and is indebted to his copartner.

[1] Kortright *v.* Smith, 3 Edw. (N. Y.) 402.

[2] Harrison *v.* Pike, 48 Miss. 46.

CHAPTER XXXIII.

THE APPOINTMENT OF A RECEIVER.

I. When a receiver will be apppointed, 1516–1534.

II. Duties and powers of a receiver, 1535–1537.

I. *When a Receiver will be appointed.*

1516. General principles.[1] — A receiver of the rents and profits may be appointed *pendente lite* when the mortgage is insufficient, and the party personally liable is insolvent; or when it is provided by the deed that the mortgagee shall have the rents and profits after a default: for otherwise, since the owner of the equity of redemption, in all those states where the mortgagee's right of entry upon the happening of a default is taken away, is entitled to the rents and profits until a sale under decree of court and possession under it given to the purchaser, the holder of the mortgage would be deprived of a valuable part of his security.[2] The mere fact that there has been a default in the payment of the debt is no ground for the appointment of a receiver,[3] unless there be a stipulation in the mortgage that the mortgagee shall have the rents, or he is entitled to them under existing laws.[4] This right to have a receiver of the rents appointed pending the

[1] For the law relating to receivers of railroad companies, see Jones on Railroad Securities: the appointment and jurisdiction of such receivers, §§ 456–492; their rights and liabilities, §§ 493–530; their debts and certificates, §§ 533–546.

[2] **New York**: Bank of Ogdensburg *v.* Arnold, 5 Paige, 38, 40; Astor *v.* Turner, 11 Paige, 436; Sea Insurance Co. *v.* Stebbins, 8 Paige, 566; Shotwell *v.* Smith, 3 Edw. 588; Warner *v.* Gouverneur, 1 Barb. 36, 38; Clason *v.* Corley, 5 Sandf. 447; Mitchell *v.* Bartlett, 51 N. Y. 447; Howell *v.* Ripley, 10 Paige, 43; Frelinghuysen *v.* Colden, 4 Ib. 204; Syracuse City Bank *v.* Tallman, 31 Barb. 201; Rider *v.* Bagley, 84 N. Y. 461; Argall *v.* Pitts, 78 N. Y. 239, 242; Wyckoff *v.* Scofield, 98 N. Y. 475. **Mississippi**: Whitehead *v.* Wooten, 43 Miss. 523; Myers *v.* Estell, 48 Miss. 372. **Kentucky**: Douglass *v.* Cline, 12 Bush, 608; Newport, &c. Bridge Co. *v.* Douglass, Ib. 673. **District of Columbia**: Keyser *v.* Hitz, 4 Mack (D. C.), 179. **New Jersey**: Leeds *v.* Gifford, 41 N. J. Eq. 464. For the reason intimated in the text, the practice of appointing a receiver is chiefly confined to those states where the mortgagee's right of entry upon default is taken away.

[3] Williams *v.* Robinson, 16 Conn. 517; Scott *v.* Ware, 65 Ala. 174.

[4] Whitehead *v.* Wooten, *supra;* Morrison *v.* Buckner, Hempst. 442.

litigation depends upon the general principle of equity, that the purpose of such an appointment is to preserve the property, so that it may be appropriated to satisfying the decree of court. A mortgagee or trust creditor, to be entitled to a receiver, must show that it is necessary to interfere with the mortgagor's possession on account of the inadequacy of the security and the insolvency of the mortgagor.[1] Where there is good equitable ground for the appointment of a receiver, it is no valid objection to the appointment that the mortgage does not expressly pledge the rents and profits of the mortgaged property.[2] If the mortgagor is doing no injury or waste to the property, and is permitting or threatening none; if he has not failed to pay the taxes, and is not allowing the mortgage debt to increase by the accumulation of interest; and if he is not shown to be irresponsible for any deficiency there may be, a receiver will not be appointed.[3] This relief is given with great caution, and only when the mortgagee has no other adequate means of protecting his rights.[4] The necessity for this protection, and the special grounds and reasons for asking it, must be clearly alleged and proved before it will be granted.[5] The appointment is a matter for the sound discretion of the court.[6]

If the mortgagor is applying the rents and profits to keep down the interest on the first mortgage, the court will not appoint a receiver on the application of the second mortgagee, although it may appear that the security is inadequate and the mortgagor insolvent.[7] If the first mortgagee be in possession, he cannot be disturbed; and when a receiver is appointed on the application of a subsequent mortgagee, it must be with the consent of prior

[1] Shotwell *v.* Smith, 3 Edw. (N. Y.) 588; Quincy *v.* Checseman, 4 Sandf. (N. Y.) Ch. 405; Pullan *v.* Cincinnati & Chicago Air Line R. R. Co. 4 Biss. 35.

As to evidence of the mortgagor's insolvency, see Durant *v.* Crowell (N. C.), 2 S. E. Rep. 541.

[2] Grant *v.* Phœnix Mut. L. Ins. Co. 7 Sup. Ct. Rep. 841.

[3] Morris *v.* Branchaud, 52 Wis. 187; Sales *v.* Lusk, 60 Wis. 490.

[4] First Nat. Bank *v.* Gage, 79 Ill. 207; Silverman *v.* N. W. Mut. Life Ins. Co. 5 Bradw. (Ill.) 124; Cortleyeu *v.* Hathaway, 11 N. J. Eq. (3 Stockt.) 39; Syracuse City Bank *v.* Tallman, 31 Barb. (N. Y.) 201. See Eslava *v.* Crampton, 61 Ala. 507.

[5] Morrison *v.* Buckner, Hempst. 442; Callanan *v.* Shaw, 19 Iowa, 183; Hackett *v.* Snow, 10 Ir. Eq. 220; First Nat. Bank of Sioux City *v.* Gage, 79 Ill. 207; Heavilon *v.* Farmers' Bank, 81 Ind. 249.

[6] Cone *v.* Paute, 12 Heisk. (Tenn.) 506; Jacobs *v.* Gibson, 9 Neb. 380; Rider *v.* Bagley, 84 N. Y. 461; Sales *v.* Lusk, *supra;* West *v.* Chasten, 12 Fla. 315; Benneson *v.* Bill, 62 Ill. 408; Cone *v.* Combs, 18 Fed. Rep. 576.

[7] Cortleyen *v.* Hathaway, *supra;* Myton *v.* Davenport, 51 Iowa, 583.

incumbrancers, or without prejudice to their rights.[1] The first mortgagee may at any time enter or bring ejectment against such receiver.

The appointment of a receiver is an equitable remedy, and has been said to be in effect an equitable execution.[2] This remedy bears the same relation to courts of equity that proceedings in attachment bear to courts of law. "The issuing of an attachment and the appointment of a receiver in a civil action are both proceedings which are merely ancillary or auxiliary to the main action. The action may be prosecuted to final judgment, either with or without such proceedings.[3] These auxiliary proceedings are merely intended to secure the means for satisfying the final judgment in case the plaintiff should succeed in the action, and they can only be resorted to where the special circumstances exist which the law prescribes for their institution."[4] The appointment of a receiver does not create any new lien upon the property, and does not ordinarily give any advantage or priority to the person obtaining the appointment over other parties in interest.[5]

When the application is for the appointment of a receiver of the mortgaged property, it is improper for the court to appoint a receiver of any property not embraced in the mortgage.[6]

1517. A receiver may be appointed on the application of the mortgagor, as against the mortgagee in possession, when there is equitable ground for it; as, for instance, when the mortgagee is irresponsible, and the rents and profits are liable to be lost, or he is committing waste. But if he be responsible, and anything remains due to him on the mortgage debt, the appointment will not be made unless he is mismanaging the property;[7] and his affidavit that there is a balance due him will be sufficient to prevent the appointment, for the question of indebtedness will not be tried on such an application; and when the question depends upon a settlement of the mortgagee's account, it can be determined only upon a suit in equity to redeem.[8]

[1] Bryan *v.* Cormick, 1 Cox's Eq. Cas. 422; Dalmer *v.* Dashwood, 2 Ib. 378.

[2] Jeremy's Eq. Jur. 249.

[3] Muncie Nat. Bank *v.* Brown (Ind.), 14 N. E. Rep. 358.

[4] Cincinnati, Sandusky & Cleveland R. R. Co. *v.* Sloan, 31 Ohio St. 1, per White, J.

[5] Pascault *v.* Cochran, 34 Fed. Rep. 358; Wormser *v.* Merchants' Nat. Bank (Ark.), 4 S. W. Rep. 198.

[6] St. Louis, A. & T. Ry. Co. *v.* Whitaker (Tex.), 5 S. W. Rep. 448.

[7] Boston & Providence R. R. Co. *v.* N. Y. & N. E. R. R. Co. 12 R. I. 220.

[8] Bolles *v.* Duff, 35 How. (N. Y.) Pr. 481; Patten *v.* Accessory Transit Co. 4 Abb. (N. Y.) Pr. 235, 237; Quinn *v.* Brittain, 3 Edw. (N. Y.) 314.

A receiver will not be appointed in a proceeding to enforce a vendor's implied lien. It is no part of the contract of sale, either express or implied, that the vendor shall appropriate anything but the land itself for the satisfaction of his purchase money; and it is a part of the implied contract that the purchaser is entitled to the possession until the land is sold to enforce the lien.[1]

1518. This remedy is regarded as peculiarly appropriate in cases of mortgages of leasehold estates, inasmuch as the value of such a security consists chiefly in the right to receive the rents, and the delay of protracted litigation may wholly destroy this value.[2] In such a case there may be urgent need of the aid of a receiver by reason of the mortgagor's failure to pay the rent, and the landlord's threatening an eviction; and a receiver may consequently be appointed before answer, and even before the service of process upon the defendant mortgagor.[3]

1519. The English rule, which prevailed before the right was made general by a recent statute,[4] was that a mortgagee who had a legal estate and might enter after a default, or recover possession at law, was not entitled to a receiver of the rents.[5] A subsequent mortgagee, however, having an equitable estate only, and being unable to enter as against the first mortgagee, was held to have a better ground for the application, and was therefore generally entitled to a receiver when proper occasion for the appointment was shown.[6] This distinction was clearly established by Lord Eldon, upon the ground that equity will not interfere when the mortgagee has an adequate remedy at law.[7] When, under

[1] Morford *v.* Hamner, 59 Tenn. 391.

[2] Astor *v.* Turner, 2 Barb. (N. Y.) 444.

[3] Barrett *v.* Mitchell, 5 Ir. Eq. 501.

[4] 23 & 24 Vict. ch. 145, §§ 11–32. This statute applies to all mortgages, those containing powers of sale as well as those that do not. It enables the mortgagee, in all cases where the payment of the principal is in arrear one year, or the interest six months, or after any omission to pay any insurance premium, which, by the terms of the deed, ought to be paid, to obtain the appointment of a receiver of the rents and profits of the estate. He is deemed the agent of the mortgagor, or owner of the property, who is solely responsible for his acts or defaults, unless otherwise provided for in the mortgage. The statute regulates his duties, powers, and compensation. This right to obtain the appointment of a receiver is independent of any action to foreclose. It is not unusual to provide in the mortgage deed for the appointment of a receiver. See Jolly *v.* Arbuthnot, 4 De G. & J. 224; Law *v.* Glenn, L. R. 2 Ch. App. 634.

[5] Berney *v.* Sewell, 1 Jac. & W. 627; Cox *v.* Champneys, Jac. 576; Sturch *v.* Young, 5 Beav. 557; Ackland *v.* Gravener, 31 Beav. 482.

[6] Anderson *v.* Kemshead, 16 Beav. 329; Dalmer *v.* Dashwood, 2 Cox, 378; Greville *v.* Fleming, 2 Jo. & Lat. 335; Meaden *v.* Sealey, 6 Hare, 620.

[7] Berney *v.* Sewell, *supra.* See, also,

peculiar circumstances, the reason for this distinction fails, and the mortgagee, although having the legal estate, is unable to take possession, he is entitled to this relief in equity; as where a mortgage was given by a surety in addition to one given by the principal debtor, yet with a proviso that the mortgagee should not have recourse to the surety's estate or be at liberty to sell it until the estate primarily liable shall prove an insufficient security.[1]

1520. In the United States, courts of equity have generally exercised their powers in appointing receivers with much more freedom; though the English rule prevails in states where the legal title rests in the mortgagee, and after forfeiture he can maintain an action of ejectment to recover possession; and in such states a court of equity will not generally appoint a receiver, but will leave the mortgagee who has the legal title, or the right at law to enter and take possession of the mortgaged premises, to pursue his legal remedy.[2] There must be something more than the inadequacy of the security and the insolvency of the mortgagor to warrant the appointment at the instance of a mortgagee

observations of Lord Romilly in Ackland *v.* Gravener, 31 Beav. 482, where he says that "though the court refuses to grant the receiver in cases where there is no question, and the mortgagee can take possession at once, there being no defence whatever to his action of ejectment, still if the mortgagee cannot take possession, as if, for instance, there is a prior mortgagee, who refuses to take possession, then, at the instance of the second mortgagee, the court does grant a receiver."

[1] Ackland *v.* Gravener, *supra.*

[2] Oliver *v.* Decatur, 4 Cranch C. C. 458; Williamson *v.* New Albany R. R. Co. 1 Biss. 201; Union Trust Co. *v.* St. Louis, &c. R. R. Co. 4 Cent. L. J. 585; Frisbie *v.* Bateman, 24 N. J. Eq. 28; Best *v.* Schermier, 6 N. J. Eq. 154; Cortleyeu *v.* Hathaway, 11 N. J. Eq. 39. In the last named case the court appointed a receiver upon the application of a subsequent mortgagee, — showing the insolvency of the mortgagor, inadequacy of the security, the sale of the premises to an insolvent purchaser, who had agreed as part of the consideration to reduce the mortgage debt, and upon obtaining possession refused to keep his agreement, and offered to sell the property for the amount of the incumbrances after taking off the crops. Mr. Chancellor Williamson, remarking upon the general rules governing the appointment of a receiver, said that the courts of New Jersey had not adopted the rule of appointing a receiver, simply on the ground of the inadequacy of the security and the insolvency of the mortgagor. "This court has gone upon the ground, that where a man takes a mortgage security for his debt, and permits the mortgagor to remain in possession, if there is a default in payment, the mortgagee must appropriate the property in the usual way to the payment of the debt. If he is a first mortgagee and wishes possession, he must take his legal remedy by ejectment. If he is a second mortgagee, he takes his security with the disadvantages of a second incumbrancer." See, also, McLean *v.* Presley, 56 Ala. 211, where a receiver was denied to a mortgagee after he had himself, without right, become purchaser at a sale under a power in the mortgage.

having the legal estate. Other special circumstances calling for this equitable relief must be shown: either that the mortgagee has only an equitable estate and cannot enter and take possession, or that, by reason of the fraud or negligence of the person in possession, the security is likely to be impaired; as, for instance, by allowing the taxes to go unpaid, whereby a lien is created superior to that of the mortgage, and which may, if not extinguished, extinguish the mortgage.[1]

The terms of the mortgage may, however, be such that the mortgagee will have no right, as against the mortgagor and his assigns, to take the rents of the property prior to a foreclosure sale, or a sale under a power.[2]

1521. The prevailing rule, in those states in which the legal title is regarded as being in the mortgagor until foreclosure, is that a receiver will be appointed upon the application of a mortgagee after default, without reference to his legal rights, whenever sufficient equitable grounds for this relief are shown; which are in general that the premises are an inadequate security for the debt, and the mortgagor or other person in possession, who is personally liable for the debt, is unable to make good the deficiency.[3] Additional grounds which are generally conclusive are,

[1] Mahon *v.* Crothers, 28 N. J. Eq. 567; Warwick *v.* Hammell, 32 N. J. Eq. 427; Brasted *v.* Sutton, 30 N. J. Eq. 462; Cone *v.* Paute, 12 Heisk. (Tenn.) 506; Johnson *v.* Tucker, 2 Tenn. Ch. 398.

[2] Freedman's Sav. & Trust Co. *v.* Shepherd (U. S.), 8 Sup. Ct. Rep. 1250.

[3] **United States:** Grant *v.* Phœnix Mut. L. Ins. Co. 121 U. S. 105; 7 Sup. Ct. Rep. 841; Kountze *v.* Omaha Hotel Co. 107 U. S. 378; 3 Sup. Ct. Rep. 911; Freedman's Sav. & Trust Co. *v.* Shepherd, 8 Sup. Ct. Rep. 1250; Cone *v.* Combs, 18 Fed. Rep. 576; 5 McCrary, 651. **New York:** Bank of Ogdensburg *v.* Arnold, 5 Paige, 39; Shotwell *v.* Smith, 3 Edw. 588; Sea Ins. Co. *v* Stebbins, 8 Paige, 565; Warner *v.* Gouverneur, 1 Barb. 36, 38; Jenkins *v.* Hinman, 5 Paige, 309; Syracuse City Bank *v.* Tallman, 31 Barb. 201; Patten *v.* Accessory Transit Co. 4 Abb. Pr. 235; *S. C.* 13 How. 502; Bolles *v.* Duff, 35 How. Pr. 481; Smith *v.* Tiffany, 13 Hun, 671; Hollenbeck *v.* Donnell, 29 Hun, 94; 94 N. Y. 342. **Mississippi:** Myers *v.* Estell, 48 Miss. 372, per Simrall, J.; Whitehead *v.* Wooten, 43 Miss. 523, 526; Phillips *v.* Eiland, 52 Miss. 721. **Iowa:** White *v.* Griggs, 54 Iowa, 650; Barnett *v.* Nelson, 54 Iowa, 41; Myton *v.* Davenport, 51 Iowa, 583; Sleeper *v.* Iselin, 59 Iowa, 379. **Alabama:** Scott *v.* Ware, 65 Ala. 174; Lehman *v.* Tallassee Manufacturing Co. 64 Ala. 567. **Wisconsin:** Schreiber *v.* Carey, 48 Wis. 208; Morris *v.* Branchaud, 52 Wis. 187; Finch *v.* Houghton, 19 Wis. 150. **North Carolina:** Kerchner *v.* Fairley, 80 N. C. 24; Durant *v.* Crowell, 2 S. E. Rep. 541. **Arkansas:** Price *v.* Dowdy, 34 Ark. 285. **Illinois:** Haas *v.* Chicago Building Soc. 89 Ill. 498. **New Jersey:** Warwick *v.* Hammell, 32 N. J. Eq. 427. **Michigan:** Brown *v.* Chase, Walker 43. **Tennessee:** Henshaw *v.* Wells, 9 Humph. 568. **Kentucky:** Woolley *v.* Holt, 14 Bush, 788.

In **Indiana** it is only necessary to show that the mortgaged property is not sufficient to discharge the mortgage debt. It is not necessary to allege or prove the

that the mortgagor is allowing the security to diminish in value, or the mortgage debt to increase.

It is true that in half or more of the states and territories the mortgagee has no legal rights that would aid him in such case, and resort to equity is the only remedy; but it is equally an appropriate remedy in some states in which the mortgagee has a legal remedy for recovering possession. In several states there is a statutory provision in the same terms, that in an action by a mortgagee for the foreclosure of his mortgage, and the sale of the mortgaged property, a receiver may be appointed where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.[1] This, however, is merely an enactment of the general equitable rule.

1522. The appointment as affected by statutes. — As already seen, by the statutory provisions of many of the states the mortgagee is not in any case entitled to possession of the mortgaged property upon a default, but the mortgagor may still retain possession until a sale is made under a decree in a foreclosure suit, and in some states even until the lapse of a period of redemption allowed after the sale. Some of these statutes would seem to prevent the appointment of a receiver in any case; while others might be regarded as giving special occasion for it, because they prevent the mortgagee's obtaining possession and protecting his rights, as he might under a mortgage conveying the legal title at common law. Even statutes precisely alike have in different states been interpreted as operating in opposite ways upon the generally received rules for the appointment of receivers in foreclosure suits; for while in Florida and Nevada the possession which the law allows to the mortgagor until a foreclosure sale is regarded as subordinate to the equitable rights of the mortgagee to the rents and profits under the condition of things which ordi-

mortgagor's insolvency. Hursh *v.* Hursh, 99 Ind. 500; Ponder *v.* Tate, 96 Ind. 330.

[1] **California**: Codes and Stats. 1876, § 10564; Guy *v.* Ide, 6 Cal. 99, 101; *S. C.* 65 Am. Dec. 490. **Arkansas**: Dig. 1874, p. 838, § 4810. **Kentucky**: Code of Prac. 1876, § 299. **Dakota Territory**: Code of Civil Procedure 1877, § 219. **Idaho Territory**: Code of Civil Procedure 1881, § 341. **Nebraska**: G. S. 568, § 266 of Civil Code; Jacobs *v.* Gibson, 9 Neb. 380. **Montana Territory**: Comp. Stats. 1887, p. 116, Code of Civil Procedure, § 221. **Washington Territory**: Laws 1877, p. 40. **Wyoming Territory**: Comp. Laws 1877, ch. 13, § 253 of Civil Code. **Ohio**: R. S. 1860, p. 1019; R. S. 1880, § 5587. **New York**: in similar terms. 3 R. S. 1875, 511, § 244.

narily authorizes the appointment of a receiver in equity, and while the statute confining the mortgagee to one remedy in case of default, which is an equitable suit for foreclosure and sale of the property, and a judgment for any deficiency, is held to be a reason for adopting the practice of appointing a receiver when there were the usual grounds for the appointment;[1] in California, on the other hand, it was held that by reason of the statute the practice of appointing a receiver to collect the rents pending the suit was not applicable; that the mortgagor continued to be the owner of the estate, and is entitled to the possession of it until it passes to some one else under a foreclosure sale.[2] In Michigan, also, the mortgagor being entitled by statute to the possession and consequently to the rents and profits of the mortgaged premises, until he is divested by foreclosure and sale, it is held that it is not competent to cut short his right in this respect by the appointment of a receiver in the foreclosure suit;[3] at least not until after default.[4]

1523. A subsequent mortgagee cannot have a receiver appointed to the prejudice of a prior mortgagee to whom something is due, if the prior mortgagee is in actual possession; and whenever an appointment is made, it is without prejudice to the right of any such prior incumbrancer to take possession.[5] The possession of the prior mortgagee, and his application of the rents to the debt due him, may be as much to the advantage of the sub-

[1] Pasco *v.* Gamble, 15 Fla. 562; Hyman *v.* Kelly, 1 Nev. 179. The court say, that the legislature having forbid the mortgagee pursuing the common law remedy of ejectment is rather a reason for a more liberal exercise of the chancellor's powers to protect the security. They expressly dissent from the case in California next cited. Guy *v.* Ide, 6 Cal. 99. See statute, § 1521. In like manner an express stipulation in the mortgage, that the mortgagor may retain possession of the property until foreclosure, prevents the appointment of a receiver. Chadbourn *v.* Henderson, 58 Penn. 460.

[2] Ibid.

[3] Wagar *v.* Stone, 36 Mich. 364; Hazeltine *v.* Granger, 44 Mich. 503.

[4] Beecher *v.* Marquette & Pacific Rolling Mill Co. 40 Mich. 307.

[5] 1 Fisher's Law of Mortg. 408; Rowe *v.* Wood, 2 Jac. & W. 553; Berney *v.* Sewell, 1 Jac. & W. 627; Hiles *v.* Moore, 15 Beav. 175; Davis *v.* Marlborough, 2 Swans. 108, 137; Dalmer *v.* Dashwood, 2 Cox, 378; Norway *v.* Rowe, 19 Ves. 144, 153; Quinn *v.* Brittain, 3 Edw. (N. Y.) 314; Trenton Banking Co. *v.* Woodruff, 3 N. J. Eq. (2 Gr.) 210; Wiswall *v.* Sampson, 14 How. 52, 64; Sales *v.* Lusk, 60 Wis. 490. In Berney *v.* Sewell, 1 Jac. & W. 627, Lord Eldon said: "I remember a case where it was much discussed whether the court would appoint a receiver, when it appeared by the bill that there was a prior mortgagee who was not in possession. I have a note of that case. There Lord Thurlow made the appointment without prejudice to the first mortgagee's taking possession, and that was afterwards followed by Lord Kenyon."

sequent mortgagee as his own would be. If the subsequent mortgagee insists upon obtaining possession himself, his only course is to redeem the estate from the prior incumbrance by paying it off;[1] and this may be rendered necessary in case the prior mortgagee in possession does not apply the income of the property to the payment of the interest and principal of the mortgage debt, but applies it to other debts of the mortgagor, or pays it over to him. A receiver may even be appointed on the application of the mortgagor, when his grantee or mortgagee is in possession and is insolvent, and it is probable that the rents and profits will be lost through his management.[2]

1524. Consent of prior mortgagee. — It is not necessary, as was at first held by Lord Thurlow,[3] that the first mortgagee's consent should be obtained before a receiver can be appointed on the application of an equitable mortgagee.[4] If he is not in possession the application will be allowed; and he cannot prevent it in any way except by taking possession himself.[5] But, as already stated, the appointment is made without prejudice to those who have prior rights in the property.[6] If the prior mortgagee has the legal estate he may take possession at any time; and if he has an equitable estate only his equitable rights are protected by the court. The receiver appointed at the instance of a junior incumbrancer is entitled to receive the rents and profits for the benefit of the latter, until the prior mortgagee takes possession, or has a receiver in aid of his own suit to foreclose.[7] But if the prior mortgagee be made a party to the bill, the junior mortgagee has no exclusive right to the income of the receivership.[8]

If a receiver of a leasehold estate be appointed, upon the application of a junior mortgagee, with power "to pay the ground-rent and taxes," upon a subsequent foreclosure of the prior mortgage,

[1] Trenton Banking Co. *v.* Woodruff, 3 N. J. Eq. (2 Green) 210.

[2] Williams *v.* Robinson, 16 Conn. 517, 524; Bolles *v.* Duff, 35 How. (N. Y.) Pr. 481. See § **1517**.

[3] Phipps *v.* Bishop of Bath, 2 Dick. 608.

[4] Bryan *v.* Cormick, 1 Cox, 422.

[5] Silver *v.* Bishop of Norwich, 3 Swans. 112, note.

[6] Dalmer *v.* Dashwood, 2 Cox, 378; Davis *v.* Marlborough, 2 Swans. 108, 137, 165; Norway *v.* Rowe, 19 Ves. 144, 153.

[7] Washington Life Ins. Co. *v.* Fleischauer, 10 Hun (N. Y.), 117; Howell *v.* Ripley, 10 Paige (N. Y.), 43; Post *v.* Dorr, 4 Edw. (N. Y.) Ch. 412; Sanders *v.* Lisle, Ir. Rep. 4 Eq. 43.

In **Virginia** a receiver is regarded as acting in the interest of all parties, and no one having a right prior to that of the plaintiff can afterwards take possession. He must finally account according to the priorities of the different incumbrancers. Beverley *v.* Brooke, 4 Gratt. 187.

[8] Miltenberger *v.* Logansport Ry. Co. 106 U. S. 286.

the receiver is not bound to apply a balance of rents in his hands to the payment of accrued taxes. The order as to rents and taxes is permissive, not mandatory; and the junior mortgagee having, by diligence, acquired a specific lien upon the rents superior to the equities of the prior mortgagee, is entitled to retain and apply them upon his mortgage.[1] It is held, however, that if the prior mortgagee commences proceedings in a different court, a receiver already appointed by another court, on the application of a junior mortgagee, will not be interfered with while such mortgagee is in actual possession, and administering the property under the directions of that court.[2]

1525. So long as anything is due the prior mortgagee, however small the amount, the possession will not be taken from him.[3] This is stated by Lord Eldon very forcibly. "If you recollect, in Mr. Beckford's case I went to the every utmost; I said then that if Mr. Beckford would swear that there was sixpence due to him, I would not take away the possession from him. If there is anything due, I cannot substitute another security for that which the mortgagee has contracted for. I know no case where the court has appointed a receiver against a mortgagee in possession, unless the parties making the application will pay him off, and pay him according to his demand as he states it himself."[4] If he insists by his answer that he has not been fully paid, the court will not upon hearing of the motion try the question whether any balance is due.[5] But if he refuses to accept what is due, or will not swear that something is due, a receiver will be appointed;[6] and it being his business to keep his accounts, if these be so incomplete that he cannot determine whether anything is due, the court may assume that nothing is due and act accordingly.[7]

1526. As a general rule, the appointment cannot be made until a bill has been filed for foreclosure, and the merits of the

[1] Ranney *v.* Peyser, 83 N. Y. 1, reversing *S. C.* 20 Hun, 11.

[2] Young *v.* Mont. & Eufaula R. R. Co. 3 Am. L. T. R. N. S. 91; *S. C.* 2 Woods, 506.

[3] Chambers *v.* Goldwin, cited and commented upon in Quarrell *v.* Beckford, 13 Ves. 377; Hiles *v.* Moore, 15 Beav. 175; Codrington *v.* Parker, 16 Ves. 469; Faulkner *v.* Daniel, 10 L. J. N. S. Ch. 33; Trenton Banking Co. *v.* Woodruff, 3 N. J. Eq. (2 Gr.) 210. In this last case the priority of the first mortgagee in possession was contested.

[4] Berney *v.* Sewell, 1 Jac. & W. 627.

[5] Rowe *v.* Wood, 2 Jac. & W. 553.

[6] Berney *v.* Sewell, *supra*.

[7] Codrington *v.* Parker, *supra*; Hiles *v.* Moore, *supra*.

case have been disclosed by the defendant's answer;[1] though under circumstances rendering an immediate appointment necessary to prevent threatened loss and injury to the property, an appointment may be made before the defendant's appearance,[2] and even before service upon him,[3] and especially if his residence be unknown.[4] The appointment may be made at the hearing, though not prayed for by the bill, if the facts stated in it are sufficient to authorize it.[5] The facts may be shown by affidavit.[6] On petition supported by the proper proof, the appointment may be made at any time during the pendency of the suit. It may even be made after judgment; and the fact that the complaint does not state facts authorizing the appointment is no objection.[7] It is against the policy of the law that a mortgagee should receive the appointment, and if he does he is not entitled to compensation.[8]

Notice of the application for the appointment of a receiver should, if practicable, be given to the mortgagor and other parties in interest.[9] The question of notice cannot of course be raised by a party who has appeared and resisted the order.[10]

In Michigan a court of equity cannot make an *ex parte* order appointing a receiver in a foreclosure suit although the parties agree thereto by the terms of the mortgage.[11]

1527. Defences to the application. — To prevent the appointment of a receiver, the mortgagor must either make a special affidavit of merits, or show that the property is sufficient to secure the mortgage.[12] His affidavit that he has a good defence, with-

[1] Astor *v.* Turner, 2 Barb. (N. Y.) 444; *S. C.* 3 How. (N. Y.) Pr. 225; 11 Paige, 436; Kattenstroth *v.* Astor Bank, 2 Duer (N. Y.), 632; Anon. 1 Atk. 578; Morrison *v.* Buckner, Hempst. 442; Hardy *v.* McClellan, 53 Miss. 507.

[2] *Ex parte* Whitfield, 2 Atk. 315; Maeden *v.* Scaley, 6 Hare, 620; Caillard *v.* Caillard, 25 Beav. 512; McCarthy *v.* Peake, 9 Abb. (N. Y.) Pr. 164.

[3] Barrett *v.* Mitchell, 5 Ir. Eq. 501.

[4] Dowling *v.* Hudson, 14 Beav. 423.

[5] Malcolm *v.* Montgomery, 2 Molloy, 500; Osborne *v.* Harvey, 1 Young & C. C. C. 116.

[6] Commercial and Savings Bank of San Jose *v.* Corbett, 5 Sawyer, 172.

[7] Schreiber *v.* Carey, 48 Wis. 208; Haas *v.* Chicago Building Soc. 89 Ill. 498.

[8] Langstaffe *v.* Fenwick, 10 Ves. 405; Scott *v.* Brest, 2 T. R. 238.

[9] Jones on Railroad Securities, § 476. Notice may be required by statute, as in Nebraska: Code of Civ. Pro. § 267; and in such case an order made without notice is void. Johnson *v.* Powers, 32 N. W. Rep. 62.

[10] Haas *v.* Chicago Building Soc. *supra.*

[11] Hazeltine *v.* Granger, 44 Mich. 503.

[12] Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.), 565; Bancker *v.* Hitchcock, 1 Ch. Dec. (N. Y.) 88; Lofsky *v.* Maujer, 3 Sandf. (N. Y.) Ch. 69; Darcy *v.* Blake, 1 Molloy, 247; Shepherd *v.* Murdock, 2 Ib. 531; Leahy *v.* Arthur, 1 Hogan, 92.

out stating what it is, or stating it vaguely, is no answer to the application for a receiver.[1] If he has conveyed the land subject to the mortgage, he is in no position to oppose the appointment.[2] Only those whose rights would be affected by the appointment can oppose it. Upon a bill to restrain waste by the mortgagor, there is no occasion for a receiver; the injunction is sufficient.[3]

After a receiver has once been appointed without opposition made at the time, an objection raised at a later stage of the case that the application was improperly allowed will not be regarded.[4]

1528. The application should show the defendant in possession, and notice of the application should be given him unless he has defaulted in the action,[5] inasmuch as in general the court is warranted in appointing a receiver only when the property is in possession of a party to the foreclosure suit, either by himself or his tenant. If the premises are in possession of a tenant who is not himself a party to the suit, he is not disturbed in his possession, but is directed to attorn to the receiver.[6] When the tenant is before the court, the receiver is appointed without restriction.[7]

There can be no appointment of a receiver of mortgaged lands after an assignee in bankruptcy of the estate of the owner of the equity of redemption has been appointed and has taken possession of the mortgaged property. The assignee is clothed with functions similar to those of a receiver.[8]

1529. The plaintiff must show by affidavit the amount due after the allowance of all just credits, if decree has been taken *pro confesso.* The statement in the bill is not enough.[9] The affidavit must also show that the defendant is in possession. If the amount actually due is in dispute, and the answer denies the allegations as to the inadequacy of the security, the court will not interfere with the possession.[10]

1530. Generally the mortgage debt must be already due to

[1] Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.), 565; MacKellar *v.* Rogers, 20 J. & S. (N. Y.) 360.

[2] Wall St. Fire Ins. Co. *v.* Loud, 20 How. (N. Y.) Pr. 95.

[3] Robinson *v.* Preswick, 3 Edw. (N. Y.) 246.

[4] Post *v.* Dorr, 4 Edw. (N. Y.) 412.

[5] High on Receivers, § 660; Sea Insurance Co. *v.* Stebbins, *supra.*

[6] Sea Insurance Co. *v.* Stebbins, *supra;* Smith *v.* Tiffany, 13 Hun (N. Y.), 671.

[7] Keep *v.* Mich. Lake Shore R. R. Co. 6 Chicago Leg. News, 101.

[8] *In re* Bennett, 2 Hughes, 156.

[9] Rogers *v.* Newton, 2 Ir. Eq. 40.

[10] Callanan *v.* Shaw, 19 Iowa, 183.

entitle the mortgagee to have a receiver appointed; at any rate there must have been such a default as entitles him to commence an action to foreclose the mortgage.[1] Yet a receiver has been granted under peculiar circumstances, when the mortgagee was not entitled to a foreclosure, and merely to keep down the interest on the mortgage;[2] as in a case where the principal debt did not become due until after the mortgagor's death.[3] If the property consists of separate parcels, or can be divided without injury to the parties interested, upon the maturity of a part of the debt a receivership of one of the parcels may be granted.[4]

1531. While a receiver is usually appointed only after the filing of a bill to foreclose the mortgage, and while it is pending,[5] yet under circumstances showing an urgent occasion for it, a receiver has been appointed after the decree for foreclosure, and even after appeal, as where there was danger that a tenant in possession might by further delay acquire rights by adverse possession.[6] Generally the appointment does not affect the rights of persons who are not parties to the suit; and will not be made unless the person in possession is either a party to the suit or his tenant.[7]

1532. To warrant an appointment of a receiver it must be shown both that the property itself is an inadequate security and that the debt or the deficiency after the application of the proceeds of the security could not be collected of the mortgagor or other person liable for it.[8] The property may be inadequate secu-

[1] **New York**: Bank of Ogdensburg *v.* Arnold, 5 Paige, 38; Lofsky *v.* Maujer, 3 Sandf. Ch. 69; Quincy *v.* Cheeseman, 4 Sandf. Ch. 405; Hollenbeck *v.* Donnell, 94 N. Y. 342. That only a part of the debt is due, and that the premises can be sold in parcels, so that a sale of part will satisfy the debt in arrear, are circumstances to be considered in determining whether a receiver will be appointed of the entire property. Quincy *v.* Cheeseman, *supra.* **Wisconsin**: Morris *v.* Branchand, 52 Wis. 187.

[2] Buchanan *v.* Berkshire L. Ins. Co. 96 Ind. 510, 531.

[3] Burrowes *v.* Molloy, 2 Jo. & Lat. 521; *S. C.* 8 Ir. Eq. 482; Newman *v.* Newman, 2 Bro. C. C. 92, note 6; Latimer *v.* Moore, 4 McLean, 110.

[4] Hollenbeck *v.* Donnell, *supra.*

[5] Adair *v.* Wright, 16 Iowa, 385; Connelly *v.* Dickson, 76 Ind. 440; and see Barlow *v.* Gains, 8 Beav. 329.

[6] Thomas *v.* Davies, 11 Beav. 29; Hackett *v.* Snow, 10 Ir. Eq. 220; Brinkman *v.* Ritzinger, 82 Ind. 358.

[7] Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.), 565; and see Zeiter *v.* Bowman, 6 Barb. (N. Y.) 133.

[8] **United States**: Keep *v.* Mich. Lake Shore R. R. Co. 6 Chicago L. N. 101; Pullan *v.* Cincinnati & Chicago Air Line R. R. Co. 4 Biss. 35; Morrison *v.* Buckner, Hempst. 442. **New York**: Astor *v.* Turner, 2 Barb. 444; Quincy *v.* Cheeseman, *supra;* Sea Ins. Co. *v.* Stebbins, *supra.* **Nevada**: Hyman *v.* Kelly, 1 Nev. 179. **Michigan**: Brown *v.* Chase, Walk. 43. **Iowa**: Adair *v.* Wright, *supra.* **Mississippi**: Myers *v.* Estell, 48 Miss. 372, 403.

rity for all the incumbrances upon it, and yet be sufficient for the particular mortgage which is the subject of the foreclosure suit.[1]

1533. There may be other and additional grounds for the application; but these two are the principal ones, which are essential in every case; and usually no others are essential if these are fully and clearly alleged and proved. Coupled with these there may be strong grounds for interference in the fact that the taxes have been suffered to remain unpaid and the property to be sold to satisfy them, and that the insurance has been neglected;[2] or that there is a contest as to whether a large portion of the property claimed under the mortgage is really covered by it;[3] or that there is fraud or bad faith on the mortgagor's part in the management of the property, as in appropriating the rents and profits to other purposes than keeping down the interest on the incumbrances, or in permitting the property to depreciate and the buildings to go to decay.[4]

Where a mortgagor has obtained an injunction to restrain the sale of the mortgaged property until certain counter-claims can be passed upon and the sum really due ascertained, the mortgagee is entitled to have a receiver appointed to take charge of the property and secure the rents and profits, provided these are in danger of being lost in the mean time.[5]

1534. In determining whether the security is adequate, the proper criterion in respect to city property is the rental of it rather than the price it would be likely to sell for. The income of improved property in large towns is considered a fair test of its value as an investment.[6] Of course there may be circumstances which in particular cases will modify or make inapplicable such a test.

[1] Warner *v.* Gouverneur, 1 Barb. (N. Y.) 36, per Edmonds, J. "The allegation is that they are not an adequate security for 'all just incumbrances' on them. All of the just incumbrances, it would seem, amount to near $70,000, while the claim of the defendants is not more than half that sum. And while the defendants do not say whether the premises are or are not adequate security for the amount due to them, the mortgagor, on the other hand, avers that they are sufficient for that amount. There is, therefore, no ground for the appointment of a receiver."

[2] Wall St. Fire Ins. Co. *v.* Loud, 20 How. (N. Y.) Pr. 95; Eslava *v.* Crampton, 61 Ala. 507; Stockman *v.* Wallis, 30 N. J. Eq. 449; Chetwood *v.* Coffin, 30 N. J. Eq. 450.

[3] Wall St. Fire Ins. Co. *v.* Loud, *supra.*

[4] Per Williamson, Chancellor, in Cortleyen *v.* Hathaway, 11 N. J. Ch. 39; Stockman *v.* Wallis, *supra;* Chetwood *v.* Coffin, *supra.*

[5] Oldham *v.* First Nat. Bank of Wilmington, 84 N. C. 304.

[6] Shotwell *v.* Smith, 3 Edw. (N. Y.) 588.

II. *Duties and Powers of a Receiver.*

1535. A receiver is the representative of all parties in interest; of the mortgagee, the mortgagor, and all holding under them, and all having rights superior to theirs. The receiver of a bankrupt corporation represents not only the mortgagees, but the assignees in bankruptcy, the creditors and stockholders as well.[1] He is not allowed to act with reference to the mortgaged property in any other relation inconsistent with his duties as receiver. If he is also mortgagee, he will not be permitted to deal with the property in any way inconistent with his duty as a receiver acting in the interest of all parties concerned.[2]

But a receiver of a corporation empowered to enforce a mortgage belonging to it may bid off the property to save a sacrifice of it. He succeeds to the rights and powers of the company in this respect.[3]

He should not involve the estate in any expense even for repairs, without the authority of the court; nor without such sanction bring suits or defend them.[4] He should always apply to the court before exercising unusual discretion.[5]

His possession is the possession of the court, and without its authority no one can directly or indirectly interfere with the property.[6] Like a trustee, he is bound to exercise such care over the property as a prudent man would take of his own.[7]

A receiver who acts in good faith, but under a mistake as to the extent of his powers, is not, it would seem, liable for his acts. But if he wilfully and corruptly exceeds his powers, he would be liable for the actual damage sustained by his conduct.[8] The receiver of a railroad may be empowered by the court to borrow

[1] Sutherland *v.* Lake Superior Ship Canal R. & I. Co. 9 N. Bank. R. 298, 307; Davis *v.* Gray, 16 Wall. 203, 217.

[2] Bolles *v.* Duff, 54 Barb. (N. Y.) 215; *S. C.* 37 How. (N. Y.) Pr. 162; Iddings *v.* Bruen, 4 Sandf. (N. Y.) Ch. 417.

[3] Jacobs *v.* Turpin, 83 Ill. 424.

[4] Wynn *v.* Newborough, 3 Bro. C. C. 88; Ward *v.* Swift, 6 Hare, 309, 313; Swaby *v.* Dickon, 5 Sim. 629, 631; Cowdrey *v.* Galveston R. R. Co. 93 U. S. 352; Ketchum *v.* Pacific R. R. Co. 3 Cent. L. J. 380; Wyckoff *v.* Scofield, 103 N. Y. 630.

[5] Parker *v.* Browning, 8 Paige (N. Y.), 388.

[6] Russell *v.* East Anglian Ry. Co. 3 Mac. & G. 104; Ames *v.* Birkenhead Docks, 20 Beav. 332, 353; Noe *v.* Gibson, 7 Paige (N. Y.), 513; Albany City Bank *v.* Schermerhorn, 9 Ib. 372.

[7] Per Lord Eldon, 1 Jac. & W. 247; 1 Fisher's Law of Mort. 444.

[8] Stanton *v.* Ala. & Chattanooga R. R. Co. 2 Woods, 506, 518.

money to complete unfinished portions of the road, to issue bonds, and make them a first lien upon the property of the road.[1]

A receiver cannot be sued without leave of the court which appointed him first obtained. That court has jurisdiction of all matters in controversy affecting the property in the hands of the receiver, and may draw to itself all controversies to which the receiver can be made a party. This court is not compelled to take jurisdiction of all such matters, but may assert its right to do so. By acting upon the parties it may prevent their proceeding in other courts against the receivers. If leave be not obtained upon motion to prosecute an independent suit at law or in equity against a receiver, the proper mode of proceeding is to apply for the appropriate remedy against the receiver by petition in the cause in which the receiver was appointed, and not by original bill. Thus a bill in equity does not lie against a receiver to restrain him from foreclosing a mortgage by sale under a power on the ground that the mortgage was obtained by fraudulent representations and is void, but relief should be sought by petition in the cause in which the receivers were appointed.[2]

1536. Receiver's claim to the rents. — By the appointment of a receiver the mortgagee obtains an equitable claim not only upon the rents and profits actually due at the time, but also upon the rents to accrue;[3] and his right to them is superior to that of the mortgagor's assignee in bankruptcy,[4] or to that of any one else claiming under the mortgagor, as, for instance, his grantee who has bought subject to the mortgage, even when he has taken a note with personal security for the rent.[5] But the receiver cannot call upon the mortgagor, or a junior mortgagee, to refund rents collected before the appointment of the receiver;[6] nor is the receiver entitled to receive such rents.[7] All rents and profits that come into the hands of the receiver are dedicated, along with the *corpus* of the funds brought within the domain of the court, to the satisfaction of the lien.[8]

[1] Kennedy *v.* St. Paul & Pacific R. R. Co. 2 Dill. 448.

[2] Porter *v.* Kingman, 126 Mass. 141.

[3] Conover *v.* Grover, 31 N. J. Eq. 539; Rider *v.* Bagley, 84 N. Y. 461.

[4] Hayes *v.* Dickinson, 9 Hun (N. Y.), 277; Post *v.* Dorr, 4 Edw. (N. Y.) 412.

[5] Lofsky *v.* Maujer, 3 Sandf. (N. Y.) Ch. 69.

[6] Howell *v.* Ripley, 10 Paige (N. Y.), 43; Post *v.* Dorr, *supra;* Johnston *v.* Riddle, 70 Ala. 219; Rider *v.* Bagley, *supra.*

[7] Noyes *v.* Rich, 52 Me. 115; Argall *v.* Pitts, 78 N. Y. 239; Wyckoff *v.* Scofield, 98 N. Y. 475; Keyser *v.* Hitz, 4 Mack (D. C.), 179.

[8] Pepper *v.* Shepherd, 4 Mack (D. C.), 269; Keyser *v.* Hitz, *supra;* Williamson *v.* Gerlach, 41 Ohio St. 682.

Under a statute giving the mortgagor the right to the possession of the premises until the expiration of a year from the time of sale upon foreclosure, the mortgagee is not entitled to a receiver during that time to take possession of the crops upon the mortgaged premises.[1]

The tenants of the premises may be compelled to attorn to the receiver.[2] So also a purchaser of the premises from the mortgagor may be directed to pay to the receiver an occupation rent.[3] If the person in possession refuses to attorn, the court may on motion pass an order directing him to do so, although he was not made a party to the suit in the first instance.[4] If he disobeys the order of court, he may be proceeded against for contempt.[5] The court will not support a receiver in using forcible or violent means to assert his rights.[6]

In an action by a receiver to collect rents of the mortgaged premises, the question of his appointment, made upon the allegation that the property was inadequate to pay the mortgage debt, cannot be raised, for the question has already been adjudicated in making the appointment.[7] A receiver appointed in a suit for the foreclosure of a mortgage upon a farm, with power to let the premises, may lease them for a year without special order, that being the usual term for such leases, and such lease is neither limited nor determined by the duration of the suit.[8]

1537. Payment discharges. — It is the right of the mortgagor, whose property has been placed in the hands of a receiver pending a suit for foreclosure, to pay the debt at any time, and have the property restored to his possession. This right does not depend upon the discretion of the court, but is one which he can claim, and the court cannot withhold.[9] Payment destroys the plaintiff's cause of action; and though in general the receiver is appointed for the benefit of all parties interested, when upon pay-

[1] White *v.* Griggs, 54 Iowa, 650; Sheeks *v.* Klatz, 84 Ind. 471.

[2] Henshaw *v.* Wells, 9 Humph. (Tenn.) 568. A tenant after attorning cannot surrender the premises to the mortgagor. Neales *v.* Bussing, 9 Daly (N. Y.), 305.

[3] Astor *v.* Turner, 2 Barb. (N. Y.) 444.

[4] Reid *v.* Middleton, 1 Turn. & R. 455; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.), 565; Parker *v.* Browning, 8 Paige (N. Y.), 388, 390; Bowery Sav. Bank *v.* Richards, 3 Hun (N. Y.), 366.

[5] Henshaw *v.* Wells, *supra.*

[6] Parker *v.* Browning, *supra.*

[7] Goodhue *v.* Daniels, 54 Iowa, 19.

[8] Shreve *v.* Hawkinson, 34 N. J. Eq. 413. See numerous English and Irish cases cited by the reporter in a note to this case, as to the power of a receiver to lease lands.

[9] Milwaukee & Minn. R. R. Co. *v.* Soutter, 2 Wall. 510; *S. C.* Woolworth C. C. 49.

ment the plaintiff's right of action is ended, the rights of the other parties fall with it.[1] But while the plaintiff's action is pending, a receiver appointed at his instance will not generally be discharged on his application without the concurrence of all others interested in the property.[2]

If the foreclosure suit is abandoned after a receiver has been appointed, it no longer operates as notice in intercepting the rents and profits.[3]

[1] Davis *v.* Marlborough, Swans. 168; Paynter *v.* Carew, 18 Jur. 417.

[2] Bainbrigge *v.* Blair, 3 Beav. 421.

[3] Johnston *v.* Riddle, 70 Ala. 219.

CHAPTER XXXIV.

DECREE OF STRICT FORECLOSURE.

I. Nature and use of this remedy, 1538–1541.
II. In what states it is used, 1542–1556.
III. Pleadings and practice, 1557–1568.
IV. Setting aside and opening the foreclosure, 1569, 1570.

I. *Nature and Use of this Remedy.*

1538. Historical. — In the progress of the doctrine of mortgages, the first advance was to relieve the mortgagor from the forfeiture of his estate through failure to perform the condition within the time limited by the deed. "At length," says Spence, "in the reign of Charles I., it was established that in all cases of mortgage, where the money was actually paid or tendered, though after the day, the mortgage should be considered as redeemed in equity as it would have been at law on payment before the day; and from that time bills began to be filed by mortgagees for the extinction or foreclosure of this equity, unless payment were made by a short day, to be named."[1] This was the form of foreclosure first adopted by courts of equity, and until quite recent times was the only form. Although this form of foreclosure has, through the action of the courts and by statutory enactments, gradually given way within the last hundred years to the more equitable mode of foreclosure by sale, it is still used by courts of equity as the mode best adapted to a few special cases, and in two of our states is the mode in general use.

This is the foreclosure spoken of in the books; but since foreclosure, in this country at least, has come to mean generally a foreclosure by sale, this form, by which the absolute ownership of the property is given to the mortgagee under a decree of court, has of late come to be designated, for the purpose of distinguishing it, a strict foreclosure.

1539. Nature of this remedy. — A strict foreclosure was the natural remedy upon a mortgage, when it was regarded as a conditional sale of the land rather than as a mere security; for the

[1] Spence Eq. Juris. 603.

mortgagor having failed to perform the condition, it was consistent with this doctrine of the condition that the courts should, after having relieved the mortgagor from the forfeiture of his condition, require him to perform it within a reasonable time or be forever barred of his right to redeem.[1] But when the mortgage came to be regarded as a mere security for the payment of the debt, and the breach of the condition as of no effect beyond giving the mortgage creditor the right to resort to his security, the natural remedy for the breach was to sell the property secured and apply the proceeds to the payment of the debt; as in this way the debtor would have the benefit of the estate when this was of greater value than the debt, and the mortgagee would have a claim for the deficiency not paid by the proceeds of sale. The advantages of a sale of the property over a foreclosure were discussed in the earlier cases, before the practice of ordering a sale had become almost universal as it now is, except in special cases.[2]

1540. Foreclosure is proper in the case of a mortgage given for the entire purchase money, when the value of the premises is not more than the mortgage debt, and the mortgagor does not appear in the suit.[3] It is proper where a mortgagee or purchaser is in possession under a legal title from the mortgagor, for the purpose of cutting off subsequent liens or incumbrances, as in case one has purchased in good faith at a mortgage sale, which is not conclusive against some incumbrancer not made a party to the suit, and the purchaser has gone into possession.[4] It is proper, too, where the mortgage is in the form of an absolute deed without any written defeasance.[5] In these cases the decree of strict foreclosure perfects and confirms the title. It bars the interest of persons who have a mere lien upon the land.[6]

1541. Land contract. — A judgment of strict foreclosure may properly be rendered upon a land contract for failure of the ven-

[1] Per Jones, Chancellor, in Lansing *v.* Goelet, 9 Cow. (N. Y.) 346, 352; Jefferson *v.* Coleman (Ind.), 11 N. E. Rep. 463.

[2] Per Jones, Chancellor, in Lansing *v.* Goelet, *supra;* per Kent, Chancellor, in Mills *v.* Dennis, 3 Johns. (N. Y.) Ch. 367; per Peckham, J., in Bolles *v.* Duff, 43 N. Y. 469; per Bland, Chancellor, in Williams's case, 3 Bland (Md.), 186, 193; Wilder *v.* Haughey, 21 Minn. 101; Mussina *v.* Bartlett, 8 Port. (Ala.) 277.

[3] Wilson *v.* Geisler, 19 Ill. 49.

[4] Kendall *v.* Treadwell, 14 How. (N. Y.) Pr. 165; *S. C.* 5 Abb. Pr. 16; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Jefferson *v.* Coleman, *supra.*

[5] Hone *v.* Fisher, 2 Barb. (N. Y.) Ch. 559.

[6] Jefferson *v.* Coleman, *supra;* Bresnahan *v.* Bresnahan, 46 Wis. 385; 1 N. W. Rep. 39.

dee to make the payments stipulated for.[1] As to the form of the decree, it should be that the money due on the contract be paid within such reasonable time as the court shall direct, and that in case of failure to make payment the vendee be foreclosed of his equity of redemption.

A decree of sale would be improper, because the title to the premises does not pass by the contract, but remains in the vendor. The vendor is entitled to such decree, although he is unable to give a perfect title to the property, unless the purchaser offers to rescind. He need not first tender a deed. If the purchaser has not tendered the purchase money, and it appears that he would not have paid it if a tender of the deed had been made, such tender is rendered unnecessary.[2]

A mortgagee who has taken possession of premises mortgaged for his support, on account of a breach of the condition, and has for several years supported himself, may have a decree to quiet the title.[3]

II. *In what States it is used.*

1542. Alabama. — There may be a strict foreclosure where the parties have themselves agreed to this, or where it is for their interest;[4] and it is a proper remedy in case the mortgagee has obtained a release of the equity of redemption, which is worth nothing above the debt, in order to cut off intermediate incumbrancers and quiet the title.[5]

1543. California. — There may be a strict foreclosure when the circumstances of the case render this proper.[6]

1543 *a*. Colorado. — There can be no foreclosure without a sale under a decree of foreclosure.[7]

1544. Connecticut. — A strict foreclosure is the usual form. As will be seen by reference to the statutes, no other form was provided for until 1886.[8] When foreclosure is made by an executor, administrator, or trustee, the premises foreclosed, or the avails thereof, if sold by him, are held by him for the benefit of the same persons as the money secured by the mortgage would

[1] §§ 225–235; Landon *v.* Burke, 36 Wis. 378; Button *v.* Schroyer, 5 Wis. 598; Baker *v.* Beach, 15 Wis. 99; Kimball *v.* Darling, 32 Wis. 675; Buswell *v.* Peterson, 41 Wis. 82; Taylor *v.* Collins, 51 Wis. 123.

[2] McIndoe *v.* Morman, 26 Wis. 588.

[3] Frizzle *v.* Dearth, 28 Vt. 787.

[4] Hunt *v.* Lewin, 4 St. & P. (Ala.) 138.

[5] Hitchcock *v.* U. S. Bank of Penn. 7 Ala. 386.

[6] Goodenow *v.* Ewer, 16 Cal. 461; McMillan *v.* Richards, 9 Cal. 365.

[7] Code 1883, § 263; Lulu & White Silver Min. Co. *v.* Nevin, 15 Pac. Rep. 611.

[8] See § **1326**.

have been held if collected without foreclosure; and in case the premises are not sold, they are distributed or disposed of to the same persons as would have been entitled to the money if collected.[1]

1544 *a*. Florida. — There is in this state no method either at law or in equity by which a mortgagee can be adjudged the absolute owner of the mortgaged property; or, in other words, there is no strict foreclosure.[2]

1545. Illinois. — It is only in rare cases, as where the property is of less value than the debt and the mortgagor is insolvent, and the mortgagee is willing to take the property and discharge the debt, that a strict foreclosure is allowed.[3] It is not proper where there are other incumbrances on the property, or creditors, or purchasers of the equity of redemption.[4]

When the mortgagor has deceased and his estate is insolvent, the case is assimilated to that where there are other incumbrances upon the property; and a sale should be directed instead of a strict foreclosure.[5]

1545 *a*. Indiana. — It is provided by statute that there shall be a sale of the mortgaged property upon foreclosure.[6] Though the mortgage be by a deed absolute in form, the court cannot decree a foreclosure and that the deed be absolute, but must order a sale.[7] It is only under special and peculiar circumstances that a strict foreclosure can be had.[8]

[1] Gen. Stats. 1875, p. 359.

[2] Browne *v.* Browne, 17 Fla. 607, 623, per Westcott, J.

[3] Sheldon *v.* Patterson, 55 Ill. 507; Horner *v.* Zimmerman, 45 Ill. 14; Stephens *v.* Bichnell, 27 Ill. 444; Wilson *v.* Geisler, 19 Ill. 49; Johnson *v.* Donnell, 15 Ill. 97; Boyer *v.* Boyer, 89 Ill. 447, 449; Hollis *v.* Smith, 9 Bradw. (Ill.) 109; Griesbaum *v.* Baum, 18 Ill. App. 614; Gorham *v.* Farson, 119 Ill. 425; Illinois Starch Co. *v.* Ottawa Hydraulic Co. 19 N. E. Rep. 486; Brahm *v.* Dietsch, 15 Ill. App. 331.

[4] Farrell *v.* Parlier, 50 Ill. 274; Horner *v.* Zimmerman, *supra;* Warner *v.* Helm, 6 Ill. 220; Greenemeyer *v.* Deppe, 6 Bradw. 490; Murphy *v.* Stith, Ib. 562; Hollis *v.* Smith, *supra;* Rourke *v.* Coulton, 4 Ib. 257; Boyer *v.* Boyer, *supra.*

[5] Boyer *v.* Boyer, *supra; S. C.* 8 Cent. L. J. 217.

[6] 2 R. S. 1876, p. 188, § 379 of Code of Practice.

[7] Smith *v.* Brand, 64 Ind. 427.

[8] In Jefferson *v.* Coleman, 11 N. E. Rep. 465, the court, by Mitchell, J., say: "In our state, as in all those states where a mortgage is regarded as creating only an equitable lien, and not as a conveyance of the legal estate, the remedy by strict foreclosure can only be resorted to under special and peculiar circumstances. At best it is a harsh remedy, and on account of its severity, and the anomalous relation it bears to our conception of the interest of a mortgagee and the statutory method of foreclosure, it should be pursued only in cases where a statutory foreclosure and sale would be inappropriate."

1546. Iowa. — "What is known as a strict foreclosure has no place in our system of procedure."[1] Yet when a junior lien-holder has not been made a party to a suit to foreclose a prior mortgage, the purchaser under the foreclosure proceeding may prosecute an action requiring the junior lien-holder to exercise his right of redemption, and in default thereof the latter may be foreclosed of all right of redemption.[2]

1547. Kentucky. — Strict foreclosures were formerly decreed; but now the Code provides that there shall be a sale in all cases.[3]

1547 *a*. Massachusetts. — A strict foreclosure may be decreed in equity, although the mortgage contains a power of sale.[4] Such a foreclosure is, however, seldom resorted to; but it is one of the usual remedies in equity which may be resorted to unless the terms of mortgage by express words or by fair implication exclude it. Thus a mortgage which does not provide any definite time for the payment of the mortgage debt, nor in any way limit the time for redemption, is not capable of a strict foreclosure.[5]

1548. Minnesota. — The court has power to decree a strict foreclosure,[6] and by a recent statute this power is expressly conferred in cases where such remedy is just and appropriate; but no final decree of foreclosure can be rendered until the lapse of one year after a judgment fixing the amount due.[7] The courts, however, regard a sale as the proper remedy in almost all cases.[8]

1549. Missouri. — Strict foreclosure is not allowed.[9]

1550. Nebraska. — Under the territorial statutes providing

[1] Gamut *v.* Gregg, 37 Iowa, 573.

[2] Shaw *v.* Heisey, 48 Iowa, 468.

[3] Caufman *v.* Sayre, 2 B. Mon. 202; Code 1867, § 404; Code 1876, § 375.

[4] Shaw *v.* Norfolk Co. R. Co. 5 Gray (Mass.), 162; Hall *v.* Sullivan Ry. Co. 21 Law Rep. 138; Shepard *v.* Richardson (Mass.), 11 N. E. Rep. 738.

[5] Shepard *v.* Richardson, *supra*. Holmes, J., delivering the judgment, said: "Properly speaking, the right to foreclose means the right to cut off a right to redeem given by equity, when, by the condition of the mortgage, the mortgagee's estate has become absolute at law. Sampson *v.* Pattison, 1 Hare, 533, 536; Kock *v.* Briggs, 14 Cal. 256, 262. Where, by the letter of the deed, the mortgagor still has the right to redeem, the mortgagee cannot maintain a bill to foreclose. Newcomb *v.* Bonham, 1 Vern. 7; 2 Vent. 364. If, as in Welsh mortgages, the mortgagee's estate never becomes absolute, there never can be a foreclosure; Yates *v.* Hambly, 2 Atk. 360; and though the failure expressly to fix a limit to the time for redemption does not necessarily take away the usual remedies (Balfe *v.* Lord, 2 Dru. & War. 480, 489), in some cases, where no time was fixed by the deed beyond which the mortgagor could not defeat the mortgagee's estate by payment, the foundation for foreclosure has been thought to be wanting. Teulon *v.* Curtis, Younge, 610." See, also, Foster *v.* Boston, 133 Mass. 143.

[6] Heyward *v.* Judd, 4 Minn. 483.

[7] Laws 1870, ch. 58.

[8] Wilder *v.* Haughey, 21 Minn. 101.

[9] Davis *v.* Holmes, 55 Mo. 349.

for foreclosure by a sale of the premises, it was held that the court had the same power as the English Chancery Court to decree a strict foreclosure.[1] But in a later case, and under different statutes, it was held that a strict foreclosure could not be had; that the remedy is confined to a sale of the premises.[2]

1550 *a*. New Jersey. — A strict foreclosure may be had, especially when the entire legal and equitable estate have become vested in the mortgagee.[3]

1551. New York. — A strict foreclosure is rarely pursued or allowed, except in cases where a foreclosure has once been had, and the premises sold without making a judgment creditor, or some person similarly situated, a party to the suit; in which case his right of redemption may properly be barred in this way.[4]

1552. North Carolina. — Foreclosure was formerly made without sale. In a case before the court in 1837,[5] Ruffin, C. J., said that "of late years a beneficial practice has gained favor, until it may be considered established in this country, not absolutely to foreclose in any case, but to sell the mortgaged premises and apply the proceeds in satisfaction of the debt: if the former exceed the latter, the excess is paid to the mortgagor; if it fall short, the creditor then proceeds at law on his bond or other legal security to recover the balance of the debt." It was then the practice to direct a sale upon the application of either party; but when no such application was made, to decree a foreclosure.[6]

1553. Ohio. — The rule formerly was that the mortgagee was entitled to foreclosure instead of a sale when two thirds of the value of the mortgaged premises did not exceed the debt. Now a sale is provided for in all cases.[7]

1553 *a*. Pennsylvania. — A court of equity has no power to bar a mortgagor of his equity of redemption. This can only be extinguished by the mortgagor's own agreement, by some act done by himself that estops him, or by a judicial sale.[8]

1554. Tennessee. — The court, as early as 1805, refused a

[1] Wood *v.* Shields, 1 Neb. 453.

[2] Kyger *v.* Ryley, 2 Neb. 20.

[3] Benedict *v.* Mortimer (N. J.), 8 Atl. Rep. 515.

[4] Bolles *v.* Duff, 43 N. Y. 469; *S. C.* 10 Abb. Pr. N. S. 399, 414; 41 How. Pr. 355; Blanco *v.* Foote, 32 Barb. (N. Y.) 535; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Kendall *v.* Treadwell, 5 Abb. (N. Y.) Pr. 16; *S. C.* 14 How. Pr. 165; Ross *v.* Boardman, 22 Hun (N. Y.), 527.

[5] Fleming *v.* Sitton, 1 Dev. & Bat. Eq. 621.

[6] Green *v.* Crockett, 2 Dev. & Bat. Eq. 390.

[7] Anon. 1 Ohio, 235; Higgins *v.* West, 5 Ohio, 554.

[8] Winton's App. 87 Pa. St. 77.

prayer that the property might be vested in the complainant, but directed a sale, according to the provision of the statute relating to sales under execution.[1]

1555. Vermont. — By reference to the statutory provisions in respect to foreclosure, it will be seen that the form of foreclosure in equity is a decree of strict foreclosure; although there may be a foreclosure by action at law with a similar result.[2]

1556. Wisconsin. — There may be a decree of strict foreclosure when this remedy is proper.[3] It may be entered by consent of parties,[4] but is not void if entered without consent.[5] Land contracts are foreclosed in this manner.[6] In the foreclosure of a mortgage conditioned to support the mortgagee and to pay his debts, the judgment should be in the nature of a strict foreclosure.[7]

III. *Pleadings and Practice.*

1557. Until the whole debt becomes due, a conclusive foreclosure of the whole estate mortgaged will not be decreed. Sometimes the mortgage contains an express stipulation that the whole debt shall be due and payable upon default in the payment of any instalment of it or of the interest secured. Of course the whole debt in such case being demandable, a decree of irrevocable foreclosure as to the entire debt may be made.[8]

1558. The rule as to parties is in general the same as in an action for the ordinary decree of sale. All persons interested in the mortgage or in the property[9] should be made parties. If the rights of some have been already barred by a previous action of foreclosure, only those who still have claims against the property should be made parties.[10] The owner of the equity of redemption is a necessary party defendant, and the only one wholly indispensable. The decree operates directly upon the property, and its effect is to restore it, upon payment, to the mortgagor; or, upon failure of payment, to vest it in the mortgagee: unless, therefore, the mortgagor or his assignee be before the court, the decree is

[1] Hord *v.* James, 1 Overt. (Tenn.) 201.

[2] See § 1361; Paris *v.* Hulett, 26 Vt. 308.

[3] Sage *v.* McLaughlin, 34 Wis. 550; Bean *v.* Whitcomb, 13 Wis. 431.

[4] Salisbury *v.* Chadbourne, 45 Wis. 74.

[5] Salisbury *v.* Chadbourne, *supra.*

[6] Landon *v.* Burke, 36 Wis. 378.

[7] Bresnahan *v.* Bresnahan, 46 Wis. 385; *S. C.* 1 Wis. Leg. N. 217.

[8] Stanhope *v.* Manners, 2 Eden, 197; Leveridge *v.* Forty, 1 Maule & S. 706; Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202.

[9] Though the interest be only that of an attaching creditor. Lyon *v.* Sanford, 5 Conn. 544. See chapter XXXI.

[10] Benedict *v.* Gilman, 4 Paige (N. Y.), 58.

without efficacy.[1] If subsequent mortgagees and others interested in the property are not made parties, they are not concluded by the proceedings. But while they are proper parties they are not necessary parties.[2] In Connecticut, where a strict foreclosure is the mode in use, it is held that the bill may be maintained without making any subsequent incumbrancers parties.[3] But the propriety of this practice has been called in question.[4] For if the mortgagor alone be made a party when there are others having rights in the equity of redemption, the foreclosure merely extinguishes his right of redemption; and he may, by acquiring the right of a subsequent incumbrancer, proceed to redeem, notwithstanding the foreclosure.[5]

1559. In a bill in equity for a strict foreclosure after the death of the mortgagee, his heirs at law are necessary parties. The decree in such case vests the legal title to the premises in the heir and not in the executor.[6] This is the rule in England, where formerly foreclosure was generally without sale.[7] When the bill is for a sale, and not for foreclosure, the heir of the mortgagee need not be joined. The personal representative alone may bring it.[8]

1560. The pleadings and practice are substantially the same as in the ordinary action; though the plaintiff sometimes offers in his complaint to take the mortgaged premises in full payment and satisfaction of his debt.[9] It is not infrequently a matter of

[1] Goodenow *v.* Ewer, 16 Cal. 461.

[2] Brooks *v.* Vt. Cent. R. R. Co. 14 Blatchf. 463, 472; Weed *v.* Beebe, 21 Vt. 495.

[3] Smith *v.* Chapman, 4 Conn. 344, 346.

[4] Goodman *v.* White, 26 Conn. 317, 320.

[5] Goodman *v.* White, *supra.*

[6] Osborne *v.* Tunis, 25 N. J. L. (1 Dutch.) 633. "True," says the Chief Justice, "while the mortgage retains its character of a pledge, of a mere security for the debt, it may be assigned by the executor. It will pass by an assignment of the bond as a mere incident of the mortgage debt. It is regarded as a chattel interest. But when the right to redeem is foreclosed, its character as a pledge ceases, and the title to the land mortgaged vests absolutely, by force of the conveyance, in the mortgagee, while living, or in his heir at law if he be dead. The title relates no longer to the money, but to the land. Equity will permit the executor to follow the land into the hands of the heir, so far at least as to satisfy the mortgage debt, but the foreclosure fixes the title in the heir. And the reason assigned in the books why the heir of the mortgagee should be made a party to a bill filed by the executor to redeem or be foreclosed is, that otherwise, if the mortgagor should redeem, there would be no one before the court from whom a conveyance of the legal estate can be taken."

[7] 1 Fisher's Mortg. § 1061.

[8] Dayton *v.* Dayton, 7 Bradw. (Ill.) 136; § 1387.

[9] For a form of complaint proper in this action, see Kendall *v.* Treadwell, 5 Abb. (N. Y.) Pr. 16; *S. C.* 14 How. Pr. 165.

agreement between the parties before the suit is commenced, that by this summary process the mortgagee shall be adjudged the absolute owner of the property, and that the mortgagor shall thereupon be freed from his debt, and in such case the bill should be drawn with reference to such agreement or understanding. In other cases in which there is no such agreement, but where the property is about equal in value to the debt, and it is the interest of the mortgagee to have a speedy foreclosure in this manner, his offer to take the property in satisfaction of the debt would generally be essential in preventing opposition to this form of foreclosure, and should therefore be set forth in the bill.

This specific remedy should be prayed for in the bill; though if in the progress of the cause the facts show that a strict foreclosure is the proper remedy, and subject to no objection, a decree might be entered in this form upon a bill drawn originally for a foreclosure sale; and although a strict foreclosure be prayed for, the court may decree a sale.[1]

1561. The judgment in a strict foreclosure bars the defendant of all right and title and equity of redemption, unless he redeems or pays the mortgage within a day certain therein fixed, and usually six months from the date of the judgment.[2] It is therefore interlocutory, and makes provision applicable in case of a failure to redeem. When a day is appointed upon which redemption is to be made, the plaintiff should attend at the time and place fixed to receive the amount and release the property.

1562. Delivery of possession.[3] — Upon failure of the defendant to pay the amount due within the time stipulated, it seems that application should be made to the court, founded upon proof of a demand and refusal to pay the amount adjudged to be paid, for the issuing of a process in the nature of a writ of assistance, to put the plaintiff into possession.[4]

Under the English practice, however, upon a decree of strict foreclosure the court does not order a delivery of possession of the

[1] Sage *v.* McLaughlin, 34 Wis. 550; Sage *v.* Central R. R. Co. 99 U. S. 334.

[2] Farrell *v.* Parlier, 50 Ill. 274. For a form of judgment where there were conflicting equities, see Kendall *v.* Treadwell, 14 How. (N. Y.) Pr. 165; *S. C.* 5 Abb. Pr. 16. For decree against two defendants of whom one stands in relation of surety to the other, see Waters *v.* Hubbard, 44 Conn. 340. See Sage *v.* Cent. R. R. Co. *supra*; *S. C.* 13 West. Jur. 218. Whether a second decree after a decree *nisi* is necessary, see Mulvey *v.* Gibbons, 87 Ill. 367.

[3] In Connecticut provision is made by statute for delivery of possession. See § 1326.

[4] Landon *v.* Burke, 36 Wis. 378; Buswell *v.* Peterson, 41 Wis. 82; Diggle *v.* Boulden, 48 Wis. 477.

premises to the complainant, but leaves him to his legal remedy by ejectment.[1] The complainant has the legal title, and the court only declares that the equity of redemption is foreclosed. The delivery of possession is not necessary to give effect to the decree of court, as it is in case of a sale. If the mortgagee be in possession, the decree may properly direct him to vacate and release the premises on payment to him of the sum found due.[2]

1563. On a strict foreclosure the time allowed for redemption before the foreclosure becomes absolute is within the discretion of the court. Six months was the usual time formerly allowed;[3] but the time is a matter within the discretion of the court, having in view the circumstances of the case.[4]

In Vermont the time is by statute made one year;[5] and under the chancery practice it was before the statute a year and a week.[6] The time may be enlarged and usually is on application, but a satisfactory reason for it must be shown.[7]

When a sale is decreed instead of a foreclosure, it is not the practice ordinarily to fix a day forp ayment in failure of which the sale shall take place,[8] though this course has sometimes been taken.[9] The reason for enlarging the time of redeeming does not apply in case a sale is ordered according to the usual practice; for the mortgagor in the case of a sale is supposed to receive the

[1] Sutton *v.* Stone, 2 Atk. 101; Seaton's Decrees, 140.

[2] Kendall *v.* Treadwell, 5 Abb. (N. Y.) Pr. 16; *S. C.* 14 How. Pr. 165.

[3] Chicago & Vincennes Railroad Co. *v.* Fosdick, 96 U. S. 47. Matthews, J., said: "According to the practice of the English chancery, a decree of this nature in a foreclosure suit, after directing an account to be taken of the principal and interest due to the complainant upon the mortgage, orders that, upon the defendant's paying the amount ascertained and certified or found to be due, within six months, at such time and place as are appointed, the complainant shall reconvey the mortgaged premises; but that, in default of such payment, the defendant shall thenceforth be absolutely debarred and foreclosed of his equity of redemption. It is necessary, however, for the complainant, in order to complete his title, to procure an order confirming it; otherwise the decree of foreclosure will not be pleadable. This order of confirmation is procured on proof to the court of non-payment according to the terms of the decree." See 2 Daniell Ch. Pr. 997.

[4] Clark *v.* Reyburn, 8 Wall. 318, 323; M'Kinstry *v.* Mervin, 3 Johns. (N. Y.) Ch. 466, note; Perine *v.* Dunn, 4 Ib. 140; Harkins *v.* Forsyth, 11 Leigh (Va.), 294; Barnes *v.* Lee, 1 Bibb (Ky.), 526; Murphy *v.* N. H. Sav. Bank, 63 N. H. 362.

[5] See § **1361**.

[6] Langdon *v.* Stiles, 2 Aik. (Vt.) 184.

[7] Monkhouse *v.* Corporation of Bedford, 17 Ves. 380; Renvoize *v.* Cooper, 1 S. & S. 365; Quarles *v.* Knight, 8 Price, 630; Downing *v.* Palmateer, 1 Mon. (Ky.) 64, 66.

[8] Mussina *v.* Bartlett, 8 Port. (Ala.) 277, 288.

[9] Nimrock *v.* Scanlin, 87 N. C. 119; Caphart *v.* Biggs, 77 N. C. 261, 267. Three months is the usual time in **North Carolina.**

full value of the property by the payment of the debt and receipt of the surplus, and, therefore, applications for the postponement of sales are not ordinarily allowed.

1564. When a strict foreclosure is had against an infant heir of the mortgagor, he is usually entitled to a day in court after he comes of age. The former practice was to allow him six months after coming of age, not to go into the accounts or to redeem, but to show error in the decree. A decree of sale, however, is binding upon the infant.[1]

1565. As already noticed a time for redemption is always allowed in a decree for a strict foreclosure. A decree which does not find the amount due, nor allow any time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, cannot be sustained unless authorized by statute. Although the usual time of redemption allowed is six months, yet it is really within the discretion of the court as to the length of it; but the discretion does not extend to withholding it entirely.[2]

Where the operation of a decree of foreclosure is suspended by an injunction, the time of redemption does not run pending the injunction. If the mortgagor is in possession and remains in possession after such decree, the rents and profits belong to him; and the mortgagee cannot recover, upon the injunction bond, for timber sold, or for the use of the mortgaged premises, before the decree becomes absolute, where the value of the premises is greater than the mortgage debt. If the mortgaged premises are not redeemed, and are insufficient to pay the debt in full, the mortgagee's remedy is by suit for the balance of the debt.[3]

1566. A foreclosure in equity may result from the dismissal of a bill to redeem. In New York it is held that after the mortgagor's failure to pay within the time limited, a final order that the bill be dismissed should be obtained, and that until this is done no title passes to the mortgagee.[4] In Massachusetts it is held that even without a formal order of dismissal, a mortgage is foreclosed upon the mortgagee's obtaining a judgment for costs after the mortgagor has failed to pay the amount found due

[1] Mills *v.* Dennis, 3 Johns. (N. Y.) Ch. 367.

[2] Clark *v.* Reyburn, 8 Wall. 318; Johnson *v.* Donnell, 15 Ill. 97; Blanco *v.* Foote, 32 Barb. (N. Y.) 535.

[3] Hill *v.* Hill (Vt.), 7 Atl. Rep. 468.

[4] See § **1108**; Wood *v.* Surr, 19 Beav. 551; Hansard *v.* Hardy, 18 Ves. 455, 460; Bolles *v.* Duff, 43 N. Y. 469; Beach *v.* Cooke, 28 N. Y. 508, 535; Perine *v.* Dunn, 4 Johns. (N. Y.) Ch. 140.

n his suit for redemption within the time ordered. The judgnent for costs substantially terminates the suit upon its merits.[1]

1567. The effect of a strict foreclosure is not to extinguish the debt, unless the premises are of sufficient value to pay it. When this is sufficient the debt is satisfied. The value of the property may be ascertained in a suit at law upon the mortgage debt to recover the difference.[2] Sometimes, by agreement of the parties or by the offer of the plaintiff, the decree transferring the absolute title to him is expressly taken in full satisfaction of the debt, and the decree should then so provide.[3] A debt not included in the decree is not satisfied by the foreclosure; and it may be shown by parol whether a particular debt was included in the decree.[4] But the decree does not operate to satisfy the debt, or any part of it, until it has become absolute by the expiration of the time limited in it within which the mortgagor may pay the debt and redeem the estate.[5]

There is no judgment for a deficiency in this form of foreclosure.[6] The statutes providing for such a judgment relate wholly to foreclosures by sale. Very frequently the plaintiff releases the mortgagor from personal liability. He can enforce it only by suit at law.

1568. Costs. — Ordinarily costs will be allowed as upon a decree for sale. If, however, as is common where this form of foreclosure is used only in special cases, and the mortgagee has

[1] Stevens *v.* Miner, 110 Mass. 57.

[2] See § 950; Edgerton *v.* Young, 43 Ill. 464, 470; Vansant *v.* Allmon, 23 Ill. 30; Spencer *v.* Harford, 4 Wend. (N. Y.) 381; Morgan *v.* Plumb, 9 Wend. (N. Y.) 287; De Grant *v.* Graham, 1 N. Y. Leg. Obs. 75; Bassett *v.* Mason, 18 Conn. 131, 136; New Haven Pipe Co. *v.* Work, 44 Conn. 230. In **Connecticut** prior to 1833 the foreclosure extinguished the debt, whatever may have been the value of the property. Derby Bank *v.* Landon, 3 Conn. 62, 63; Swift *v.* Edson, 5 Conn. 531; M'Ewen *v.* Welles, 1 Root (Conn.), 202; Fitch *v.* Coit, 1 Root (Conn.), 266. An act of that year (G. S. 1875, p. 358, § 2) provided that the foreclosure should not preclude the mortgage creditor from recovering the difference between the value of the property estimated at the expiration of the time limited for redemption and the mortgage debt. Laws 1878, ch. 129, § 2, provided for the appointment of appraisers to determine the value of the property. It was held that the two statutes together left it optional with either of the parties whether there should be an appraisal, or whether the court should determine the value of the property upon proper evidence. Windham Co. Sav. Bank *v.* Himes, 12 Atl. Rep. 517. In **Vermont** the decree, whether upon a bill in chancery or in an action of ejectment, after the expiration of the time of redemption, operates as satisfaction in whole or *pro tanto*, as the case may be. Paris *v.* Hulett, 26 Vt. 308.

[3] 5 Wait's Prac. 248, 249.

[4] Goddard *v.* Selden, 7 Conn. 515, 520.

[5] Peck's Appeal, 31 Conn. 215.

[6] Bean *v.* Whitcomb, 13 Wis. 431.

proposed to take the property and discharge the debt, no costs are allowed. In all cases the court has discretionary power in this matter. When a purchaser at a foreclosure sale brings a bill for a strict foreclosure against a prior judgment creditor who was not a party to the former foreclosure suit, if he wishes to redeem he must pay the costs of suit, but not the costs of the suit on which the sale was made.[1]

IV. *Setting aside and opening the Foreclosure.*

1569. A strict foreclosure may be set aside for many of the same causes for which a foreclosure sale is set aside.[2] As the effect of the decree is to vest an absolute title in the holder of the mortgage, so long as he retains the title he stands very much in the same relation to the property and to the mortgagor as does a mortgagee who has bought the property at a foreclosure sale, and against whom the court would more readily set aside the foreclosure sale than against a stranger who had in good faith made the purchase.[3] After the foreclosure the relations of the parties are also very much the same as they would be if the mortgage had been foreclosed by entry and possession in the manner in use in Massachusetts; and the foreclosure will be waived or opened by the subsequent dealings of the parties between themselves in the same manner;[4] as, for instance, by the payment of part of the amount due;[5] by their treating the debt as still due;[6] or by their agreeing in any way that the foreclosure shall have no effect.[7]

The opening of a decree of foreclosure does not depend upon the inquiry whether the proceedings in the case were regular, but may depend wholly upon equitable considerations in any way affecting the rights of parties.[8] Where the failure of the mortgagor to pay according to the decree was not through his own negligence, but in consequence of propositions for settlement and payment which were to be carried into effect after the time of payment had expired, and the failure to perform this was on the

[1] Benedict *v.* Gilman, 4 Paige (N. Y.), 58; Vroom *v.* Ditmas, 4 Paige (N. Y.), 526.

[2] See §§ **1668–1681**.

[3] See § **1671**.

[4] See §§ **1265–1275**.

[5] Converse *v.* Cook, 8 Vt. 164; Smalley *v.* Hickok, 12 Vt. 153; Gilson *v.* Whitney, 51 Vt. 552.

[6] Bissell *v.* Bozman, 2 Dev. Eq. (N. C.) 154.

[7] Griswold *v.* Mather, 5 Conn. 435.

[8] Bridgeport Savings Bank *v.* Eldredge, 28 Conn. 556.

part of the mortgagee, the decree of foreclosure was opened.[1] The mortgagee's promise to give the mortgagor further time for redemption after the expiration of the decree does not entitle the mortgagor to claim that the decree be opened, if he has made no offer to perform his part of the agreement.[2] A promise by the holder of a mortgage or decree of foreclosure to allow a redemption after the expiration of the decree is equally binding upon one who purchases the decree with knowledge of such promise.[3] A decree was opened after the expiration of the time limited for redemption, for the reason that the mortgagor, having paid part of the debt, fell sick on a journey undertaken for the purpose of obtaining the balance of the money, and was unable to get back until ten days after the time limited, when he tendered the amount.[4] It was opened, also, in a case where the mortgagor supposed he had made a valid tender within the time limited, though by informality it was not good.[5]

If the mortgagor against whom a decree of foreclosure has been entered limiting the time of redemption to a particular day is prevented from paying the debt and redeeming, by the happening of an unforeseen event over which he had no control, a court of equity will open the foreclosure. This was done in a case where the foreclosure was to become absolute on the fifth day of August. The property was worth more than eight thousand dollars, and was nearly all the mortgagor had, and the debt was less than four thousand dollars. The mortgagor had relied upon receiving the money from an uncle who had ample means, and had promised to furnish it on the third day of August, but unexpectedly failed to do so. On the evening of the fifth day of August the mortgagor procured a person who had the necessary amount in United States bonds, but not in money, to go to the mortgagee's house that evening. This person finding that the mortgagee had gone to bed, sent him word by his wife that he had come to redeem the mortgaged property; to which the mortgagee replied that he was sick, and so nothing further was done. The mortgagor was allowed to redeem.[6]

If the mortgagee, after a decree of foreclosure and before the expiration of the time limited for redemption, says to the mort-

[1] Pierson *v.* Clayes, 15 Vt. 93.
[2] Blodgett *v.* Hobart, 18 Vt. 414.
[3] Woodward *v.* Cowdery, 41 Vt. 496.
[4] Doty *v.* Whittlesey, 1 Root (Conn.), 310.
[5] Crane *v.* Hanks, 1 Root (Conn.), 468.
[6] Bostwick *v.* Stiles, 35 Conn. 195.

gagor that he may pay the debt after the time limited, and that no advantage should be taken of the decree, and the mortgagor in consequence allows the time to expire without paying the debt, the foreclosure will be opened. The mortgagor is also entitled to equitable relief if the decree has been obtained by fraud, or if after it is obtained he is deceived in relation to the time limited for redemption, and he consequently fails to redeem;[1] or if no service of the summons was made upon him, and he had no actual knowledge of the pendency of the suit until after the time of redemption had expired, though the decree found that service had been made.[2]

Where the parties to a foreclosure suit agreed upon a time for redemption to be limited by the decree, but by mistake the time was not inserted in the decree, the mortgagor at the end of three years after the time so limited by agreement was not allowed to open the foreclosure and redeem. The mortgagor could equitably ask for nothing more than the correction of the mistake, and this would avail him nothing.[3] This relief may be had on an ordinary bill to redeem, taking no notice of the decree of foreclosure.[4]

1570. In any case where proper service has not been made on a defendant, the foreclosure will be opened, or he will be allowed on application to have the judgment set aside and to appear in the suit.[5] In his application for such relief he must tender payment of the mortgage debt or show his readiness to do so.[6] Where notice of a bill for foreclosure was ordered by the court to be given by mailing an attested copy of the bill to the parties interested in the property, and a subsequent mortgagee did not receive the notice, and had no knowledge of the suit until after a decree had been passed and the time limited for redemption had expired, the foreclosure was opened and further time for redemption allowed.[7]

[1] Weiss *v.* Alling, 34 Conn. 60.

[2] Bridgeport Savings Bank *v.* Eldredge, 28 Conn. 556, 561.

[3] Colwell *v.* Warner, 36 Conn. 224.

[4] Bridgeport Savings Bank *v.* Eldredge, *supra.*

[5] Fall *v.* Evans, 20 Ind. 210; Mitchell *v.* Gray, 18 Ind. 123. Wilkinson *v.* Chilson (Wis.), 36 N. W. Rep. 836.

[6] Hatch *v.* Garza, 7 Tex. 60.

[7] Bank of North America *v.* Norwich Savings Society, 37 Conn. 444.

CHAPTER XXXV.

DECREE OF SALE.

I. A substitute for foreclosure, 1571–1573.
II. The form and requisites of the decree, 1574–1586.
III. The conclusiveness of the decree, 1587–1589.
IV. The amount of the decree, 1590–1601.
V. Costs, 1602–1607.

I. *A Substitute for Foreclosure.*

1571. Generally. — As already noticed, the earliest remedy sought in chancery in the foreclosure of mortgages was a decree wholly cutting off the debtor's right to redeem, and vesting the estate absolutely in the mortgagee. This procedure, when the property exceeded in value the debt, sometimes operated harshly upon the debtor. It operated unjustly to the creditor as well when the property was insufficient to pay the debt, because no convenient remedy was afforded him to collect the deficiency. A more equitable system was early adopted by the courts in this country, under which the property was sold for the benefit of the parties interested, and the proceeds applied first to the payment of the mortgage debt, and the surplus, if any, paid to the debtor or his assigns. If a balance of the debt remained unpaid after applying the proceeds of the property, an action at law might be had against the debtor to recover.

Now, in many states under the new codes of civil practice, the formal distinction between suits in equity and suits at law has been done away with, and though foreclosure remains of course an equitable procedure, provision is made for a decree or judgment in this proceeding, not only for a sale of the property, but also for a recovery of any balance of the debt remaining after the sale, thus avoiding the necessity of a separate action at law.

1572. In England the usual practice formerly was to decree a strict foreclosure, though the Court of Chancery had the power, without the aid of any statute, to order a sale of the prop-

erty.[1] Now it is provided by the Chancery Improvement Act,[2] that upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or of any person claiming under them respectively, the court may, instead of a foreclosure, direct a sale of the property upon such terms as it may deem proper. The consent of the mortgagee, or those claiming under him, is requisite to a sale, when the request for it is made by any other person, unless the party making the request deposits a reasonable sum of money for the purpose of securing the performance of such terms as the court may impose upon him.[3] Under this statute the parties have no absolute right to require a sale, but the court has power in its discretion to grant it; and this is now the usual course. A sale may be directed against the wish of the mortgagor.[4] Where the security has been scanty, it has always been deemed proper to direct a sale;[5] as also when the property was unproductive.[6]

An equitable mortgagee by deposit of title deeds is entitled to a decree of foreclosure instead of sale.[7] The usual practice in granting a sale of the property was to give a limited time, varying from one month,[8] to six months,[9] within which the mortgagor might redeem before the sale. Sometimes, however, an immediate sale was ordered, as where the property was unproductive,[10] or where for any reason this seemed to be for the benefit of all the parties.[11]

It was also the practice, in case the equity of redemption belonged to an infant heir or devisee, to direct a sale with the consent of the mortgagee, because a sale would bind the infant, but he would be entitled to a day after coming of age to show cause against a decree of foreclosure.[12]

But in this country a sale, with rare exception, being made in all cases, the only inquiry where infants are concerned is,

[1] 2 Story's Eq. §§ 1024–1026. In Ireland the decree is always for a sale. Hutton *v.* Mayne, 3 Jo. & Lat. 586.

[2] 15 & 16 Vict. ch. 86, § 48.

[3] The deposit must be sufficient to cover an unsuccessful attempt to sell. Bellamy *v.* Cockle, 18 Jur. 465.

[4] Newman *v.* Selfe, 33 Beav. 522; and see Woodford *v.* Brooking, L. R. 17 Eq. 425.

[5] Dashwood *v.* Bithazey, Moseley, 196.

[6] How *v.* Vigures, 1 Ch. R. 18.

[7] James *v.* James, L. R. 16 Eq. 153.

[8] Smith *v.* Robinson, 1 Sm. & Giff. 140; Staines *v.* Rudlin, 16 Jur. 965.

[9] Bellamy *v.* Cockle, *supra;* Daniell's Ch. p. 1152.

[10] Foster *v.* Harvey, 11 Weekly R. 899.

[11] Hewitt *v.* Nanson, 28 L. J. (Ch.) 49.

[12] Fisher's Mortg. pp. 526, 1018; Scholefield *v.* Heafield, 7 Sim. 667; Davis *v.* Dowding, 2 Keen, 245; Booth *v.* Rich, 1 Vern 295.

whether a sale of the whole or of a part of the premises will be most for the infant's benefit, and a reference should be made to ascertain this fact, and what part shall be sold if less than the whole.[1]

1573. Independently of all statutory provisions, a court of equity has jurisdiction to order a sale and provide for carrying it out,[2] although in most of the states where foreclosure is effected by a judicial sale there are statutes providing for this, and regulating it.

No sale can be made without a decree of court for that purpose first obtained.[3] Although the practice of foreclosure and sale of the mortgaged property in equity is traced to the civil law,[4] where the remedy was generally by a proceeding *in rem* for a sale of the property, yet under that law it was not indispensable that the mortgagee should obtain a judicial decree for such sale; the mortgagee might also by his own act, after giving a certain prescribed notice to the debtor, sell the property and reimburse himself from the proceeds of the sale.[5] If the debtor could not be found so as to serve the notice upon him, an order of court was necessary. This right to sell was not confined to cases where the parties had expressly provided for it, but might be exercised as well when the mortgage itself was silent upon the matter.[6] But under the common law practice the mortgagee is never allowed to sell by his own voluntary act without a judicial decree, except when a power of sale is expressly given him, and even when he has such special authority, in some states it is required by statute that a decree for the sale shall first be obtained, and the sale thus becomes a judicial sale rather than a sale under the power.

There is no rule in equity which prevents a mortgage creditor

[1] Mills *v.* Dennis, 3 Johns. (N. Y.) Ch. 367.

[2] Lansing *v.* Goelet, 9 Cow. (N. Y.) 346, 352, where Chancellor Jones, in an elaborate opinion, justifies the practice of courts of equity in ordering sales; Mills *v.* Dennis, *supra*; Williams's case, 3 Bland (Md.), 186, 193; Belloc *v.* Rogers, 9 Cal. 123; Green *v.* Crockett, 2 Dev. & B. Eq. (N. C.) 390, 393.

The earliest statute in **New York** recognizing a foreclosure sale is that of April 3, 1801; Laws of N. Y. (Webster & Skinner's ed.) 443; though it is said that the practice of selling the mortgaged property prevailed under the colonial government.

[3] Hart *v.* Ten Eyck, 2 Johns. (N. Y.) Ch. 62, 100. "There never was an instance," says Chancellor Kent, "in which the creditor holding land in pledge was allowed to sell at his own will and pleasure."

[4] Story's Eq. Juris. §§ 1008, 1011.

[5] Ibid. §§ 1008, 1024.

[6] Ibid. § 1009. "Even an agreement between them, that there should be no sale, was so far invalid that a decretal order of sale might be obtained upon the application of the creditor."

from taking a general decree of foreclosure on the mortgage for the reason that he has already obtained a judgment lien on other real estate of the mortgage debtor for the same debt.[1]

A decree for the foreclosure of a mortgage is not a lien on any real estate of the defendant other than that embraced in the mortgage, although the decree be in form that the complainant recover of the defendant a specific sum of money.[2]

II. *The Form and Requisites of the Decree.*

1574. In general. — The decree for the sale of the premises should contain a description of the property to be sold, a statement of the amount of the debt, a direction that the premises, or so much of them as may be necessary, shall be sold by an officer designated, who shall execute a deed to the purchaser, and that out of the proceeds of the sale he pay to the plaintiff the amount of his debt, interest, and costs, together with the expenses of the sale. It is usual to provide that the plaintiff may purchase at the sale; and that the purchaser shall be let into possession on the production of the deed. If a personal judgment is asked for and is proper, the defendants, who are personally liable for the debt, must be designated.[3] A personal judgment against the defendant, followed by the usual order of sale, may be regarded as a finding of the amount due, and as in effect a judgment of foreclosure and sale.[4]

If redemption is allowed after sale, this right should be provided for in the decree, although it will not be considered as denied if not provided for.[5]

1575. The decree and order of sale may properly follow the terms of the mortgage, when this upon its face appears to convey the entire estate, and the officer must sell accordingly; but the purchaser will take only the interest the mortgagor had in the premises, and it is no ground for reversal that the mortgagor had only an equitable interest.[6] If the mortgagor had no title to a portion of the premises embraced in the mortgage, this portion may properly be omitted from the order of sale.[7] When the

[1] Gushee *v.* Union Knife Co. 54 Conn. 101.

[2] Scott *v.* Russ, 21 Fla. 260; Clapp *v.* Maxwell, 13 Neb. 542.

[3] Leviston *v.* Swan, 33 Cal. 480; 5 Wait's Prac. 218.

[4] Boynton *v.* Sisson, 56 Wis. 401.

[5] Boester *v.* Byrne, 72 Ill. 466; Charter Oak L. Ins. Co. *v.* Stephens (Utah), 15 Pac. Rep. 253.

[6] Jones *v.* Lapham, 15 Kans. 540; Norris *v.* Luther (N. C.), 8 S. E. Rep. 95; Schwartz *v.* Palm, 65 Cal. 54.

[7] Castro *v.* Illics, 22 Tex. 479.

terms of the mortgage are followed in the direction of sale, and the sheriff or referee sells a less estate than that expressed in the mortgage, as, for instance, a leasehold estate when the mortgage erroneously described an estate in fee, the sale transfers all the title the mortgagor had in the premises, and it does not lie with the mortgagor, nor with a purchaser who has full knowledge of the facts, to object.[1]

It is usual to embody in the order of sale a full description of the property to be sold, with the particular boundaries of it, so far at least as they can be ascertained from the mortgage. But this is not essential. The decree of sale, instead of describing the mortgaged property at length, may direct a sale of the premises as described in the complainant's bill; and if the premises are properly described in the bill or in the mortgage, and this is made part of the bill as an exhibit, no formal description is necessary in the decree.[2] But if it cannot be ascertained to what land the decree refers it will be void for indefiniteness.[3] If the original mortgage contains in the description of the premises a latent ambiguity which renders it uncertain what are the boundaries, the court may by its judgment fix the boundaries of the land with reference to the foreclosure sale.[4]

1576. Order of sale. — If portions of the premises have been sold subsequent to the mortgage, the decree should provide that the portion still owned by the mortgagor, or the person equitably bound to pay the debt, shall be first sold, and then the portions previously alienated in the inverse order of their alienation.[5] If a party to the suit desires to have the premises sold in a particular order, he should see that the decree so provides; or after the entry of the decree he may move for an order to the referee directing the manner in which the premises are to be sold.[6] In order to ascertain the respective equities of different owners the court may order a reference.[7] If the owner of the land makes no re-

[1] Graham *v.* Bleakie, 2 Daly (N. Y.), 55.

[2] Logan *v.* Williams, 76 Ill. 175.

As to omission of name of county and state in which the property is situated, see Burton *v.* Ferguson, 69 Ind. 486.

[3] Kibbe *v.* Thompson, 5 Biss. 226.

[4] Doe *v.* Vallejo, 29 Cal. 385.

[5] New York Life Ins. & Trust Co. *v.* Milnor, 1 Barb. (N. Y.) Ch. 353; Knickerbacker *v.* Eggleston, 3 How. (N. Y.) Pr. 130; Rathbone *v.* Clark, 9 Paige (N. Y.), 648; Worth *v.* Hill, 14 Wis. 559; State *v.* Titus, 17 Wis. 241; Ogden *v.* Glidden, 9 Wis. 46; Warren *v.* Foreman, 19 Wis. 35; Cheever *v.* Fair, 5 Cal. 337.

[6] Vandercook *v.* Cohoes Sav. Inst. 5 Hun (N. Y.), 641.

[7] Bard *v.* Steele, 3 How. (N. Y.) Pr. 110; New York Life Ins. & Trust Co. *v.* Cutler, 3 Sandf. (N. Y.) Ch. 176.

quest as to the order in which several tracts of land included in the mortgage shall be sold, he cannot upon appeal object to a decree of court definitely fixing the order of sale.[1]

1577. Where only part of the debt or an instalment of interest is due, and the premises can be sold in parcels, the decree should be for the absolute sale of so much as will raise the amount actually due.[2] If the premises cannot be sold in parcels, the judgment should direct the sale of the whole, and the payment to the plaintiff of the amount actually due, and that the surplus be brought into court to await further order.[3] In such case it should appear of record that the court had first inquired whether the land could be sold in parcels.[4] A decree directing a sale "according to law" has been held sufficient, although a statute required the court to direct a sale of the premises, "or so much thereof as is necessary."[5] When part of the mortgaged property has been sold for the payment of one instalment, a further decree of sale may be had for an instalment subsequently falling due.[6] Although the suit was commenced when only a part of the debt or one instalment of it was due, if the whole debt becomes due before the decree is entered, this should be in the ordinary form for a sale of the property to satisfy the whole debt.[7]

Where a decree directs a sale subject to the mortgage for the part of the debt not due, and the officer announces that the sale will be made in this manner, his failure to state this fact in his certificate of purchase and in his report of the sale, and the omission of this fact in the confirmation of the sale, do not affect or modify the original decree, or release the lien reserved for the unforeclosed part of the debt. Under a decree for a sale subject to a lien specified, parol testimony is admissible to show that the property was offered for sale subject to such lien.[8]

A foreclosure for an instalment due before the principal amount, and a sale of the entire property, pass the interest of both mort-

[1] Price *v.* Lauve, 49 Tex. 74.

[2] James *v.* Fisk, 17 Miss. (9 S. & M) 144; Roe *v.* Nicholson, 13 Wis. 373; Hunt *v.* Dohrs, 39 Cal. 304; Harris *v.* Makepeace, 13 Ind. 560; Denny *v.* Graeter, 20 Ind. 20; Beauchamp *v.* Leagan, 14 Ind. 401; Probasco *v.* Van Eppes (N. J.), 13 Atl. Rep. 598. See §§ **1478, 1619, 1700.**

[3] Walker *v.* Jarvis, 16 Wis. 28.

[4] Cubberly *v.* Wine, 13 Ind. 353; Wainscott *v.* Silvers, Ib. 497; Stewart *v.* Nettleton, 13 Wis. 465.

[5] Treiber *v.* Shaffer, 18 Iowa, 29; and see Kirby *v.* Childs, 10 Kans. 639.

[6] Fleming *v.* Soutter, 6 Wall, 747; McDougal *v.* Downey, 45 Cal. 165.

[7] Smalley *v.* Martin, Clarke (N. Y.), 293; Manning *v.* McClurg, 14 Wis. 350; Buchanan *v.* Berkshire L. Ins. Co. 96 Ind. 510, 524.

[8] Hughes *v.* Frisby, 81 Ill. 188.

gagor and mortgagee in the property, and a clear title to the purchaser.[1] The court may order payment of the instalment due; but if the property be indivisible so that a larger amount is received than is needed for that purpose, the court may retain custody of the surplus and jurisdiction of the case until the whole debt falls due.[2]

The power to foreclose and sell for the principal sum secured by a mortgage, on account of the non-payment of an instalment due, or of interest accrued, or taxes, exists when it is stipulated in the mortgage that in case of such non-payment the mortgagee may sell the premises and pay the debt from the proceeds.[3]

1578. The decree should not attempt to give any relief not sought for in the pleadings;[4] if it does it will be vacated on motion.[5] But sometimes, under the general prayer for relief, the court may grant relief not specifically asked for. Thus where a railroad mortgage contained a provision that in case of a foreclosure sale the holders of a majority of the bonds secured by the mortgage should in writing request the trustee to purchase the premises for the use and benefit of the bondholders, he should be authorized to do so, and the deed of trust was made a part of the bill, it was held to be proper to grant the relief specifically which the provisions of the deed of trust contemplated.[6]

1579. It should not attempt to interfere with the rights of any who are interested in the property, but are not made parties to the suit; and it is ineffectual so far as it does this.[7] It should protect the rights of a defendant whose title to a part of the premises is paramount, although he could not be dispossessed of such part under the decree even if no reservation is made in respect to it.[8] Only the rights and interests possessed by the mortgagor at the date of the mortgage can be sold. A judgment which forecloses a prior mortgage is irregular, and may be opened

[1] Escher *v.* Simmons, 54 Iowa, 269; Poweshiek Co. *v.* Dennison, 36 Iowa, 244; Harms *v.* Palmer (Iowa), 35 N. W. Rep. 515; Grattan *v.* Wiggins, 23 Cal. 16.

[2] McDowell *v.* Lloyd, 22 Iowa, 448; Burroughs *v.* Ellis (Iowa), 38 N. W. Rep. 141; Clark *v.* Abbott, 1 Madd. Ch. 474; Mussina *v.* Bartlett, 8 Port. (Ala.) 277, 284; Smalley *v.* Martin, Clarke (N. Y.), 293; Adams *v.* Essex, 1 Bibb (Ky.), 149.

[3] Pope *v.* Durant, 26 Iowa, 233; Kramer *v.* Rebman, 9 Iowa, 114.

[4] Knowles *v.* Rablin, 20 Iowa, 101.

[5] Simonson *v.* Blake, 12 Abb. (N. Y.) Pr. 331; *S. C.* 20 How. Pr. 484.

[6] Sage *v.* Cent. R. R. Co. of Iowa, 99 U. S. 334; *S. C.* 13 West. Jur. 218.

[7] Watson *v.* Spence, 20 Wend. (N. Y.) 260; Montgomery *v.* Tutt, 11 Cal. 307; and see Tutten *v.* Stuyvesant, 3 Edw. (N. Y.) 500.

[8] Wicke *v.* Lake, 21 Wis. 410; San Francisco *v.* Lawton, 21 Cal. 589; Elias *v.* Verdugo, 27 Cal. 418.

on motion of the prior mortgagee.[1] The rights of subsequent mortgagees who are made parties to the suit are generally sufficiently protected by the general direction in the decree for the payment of the surplus money into court, and by the subsequent proceedings for its distribution; though the practice in some courts has been to determine the rights of junior mortgagees in the first place, and direct the payment of the surplus towards the satisfaction of them.[2]

But the rights of subsequent incumbrancers may be protected by the court in the sale of the property, where a portion of it is sufficient to satisfy the mortgage, by ordering the sale of enough, so that the other incumbrancers may be paid.[3] And where after the decease of the mortgagor it appeared to be for the benefit of his children that the entire mortgaged premises should be sold, though the mortgage might have been satisfied by a sale of a part, the court ordered the sale of the whole.[4]

1580. When a junior mortgagee forecloses his mortgage by bill in equity, in case the prior mortgage is not yet due, he may have a decree for a sale of the equity of redemption subject to the prior mortgage, leaving the purchaser to pay that when it becomes due. If the prior mortgage be due, the junior mortgagee may redeem and sell the whole estate to obtain the redemption money as well as his own claim.[5] It has been held in a few cases that without redeeming he may make the prior mortgagee a party to the bill, and ask for a sale of the whole estate, and the payment of all incumbrances out of the proceeds;[6] but this is not the law now. Though the prior mortgagee be made a party and is defaulted, the decree only bars the equity of redemption of the complainant's mortgage, without affecting in any way that which is superior to it.[7] A junior mortgagee is entitled to proceed with his bill to foreclose, although the senior mortgagee has obtained a judgment of foreclosure, and the junior mortgagee may seek his remedy against the surplus moneys on

[1] McReynolds *v.* Munns, 2 Keyes (N. Y.), 214.

[2] Union Water Co. *v.* Murphy's Flat Fluming Co. 22 Cal. 620.

[3] Livingston *v.* Mildrum, 19 N. Y. 440.

[4] Brevoort *v.* Jackson, 1 Edw. (N. Y.) 447.

[5] Western Ins. Co. *v.* Eagle Fire Ins. Co. 1 Paige (N. Y.), 284; and see Trayser *v.* Indiana Asbury University, 39 Ind. 556.

[6] Vanderkemp *v.* Shelton, 11 Paige (N. Y.), 28.

[7] McCormick *v.* Wilcox, 25 Ill. 274; Harshaw *v.* McKesson, 66 N. C. 266.

the first mortgage.[1] He is entitled to have the issues raised in his action tried when his action is reached.

1581. After-acquired title. — Ordinarily the title ordered to be sold is only that which the mortgagor held at the date of the mortgage. If in any case there are facts of an equitable character, such that a title acquired afterwards by the mortgagor or his vendee should be subjected to the lien of the mortgage, these should be set out in the complaint, and such after-acquired title should be included in the decree of sale; otherwise this will not include or affect the after-acquired title.[2] It must be first subjected to the lien of the mortgage by the foreclosure decree, which then operates upon this title to the same extent as if it had been included in the mortgage.[3]

1582. When several persons have acquired undivided interests in the land subsequent to the mortgage as co-tenants, the decree will not apportion the debt among them.[4]

1583. If the complainant holds two mortgages covering in part the same premises, but securing different debts, one decree will be made for both debts instead of a separate decree for each;[5] but if a subsequent purchaser or mortgagee has become interested in the property covered by one and not by the other, separate decrees should properly be made.[6]

1584. Death of mortgagor. — A judgment for foreclosure and sale without any provision as to a deficiency may be executed notwithstanding the death of the mortgagor. It is to be enforced against the property and not against the person. There is no occasion to revive it or to bring in new parties.[7] The sale can be made and the purchaser let into possession on producing the deed of the referee or other officer making the sale.[8] So far as this part of the decree is concerned, it is in the nature of a proceeding *in rem*, and the death of the mortgagor after the entry of the decree is no ground for staying its execution.[9]

The statutes which provide that no suits shall be brought

[1] Daily *v.* Kingon, 41 How. (N. Y.) Pr. 22.

[2] Kreichbaum *v.* Melton, 49 Cal. 50. See §§ 679–683.

[3] San Francisco *v.* Lawton, 18 Cal. 465.

[4] Perre *v.* Castro, 14 Cal. 519.

[5] Phelps *v.* Ellsworth, 3 Day (Conn.), 397.

[6] Enright *v.* Hubbard, 34 Conn. 197.

[7] Hays *v.* Thomae, 56 N. Y. 521; Harrison *v.* Simons, 3 Edw. (N. Y.) 394; Cowell *v.* Buckelew, 14 Cal. 640; Trenholm *v.* Wilson, 13 S. C. 174.

[8] Lynde *v.* O'Donnell, 12 Abb. (N. Y.) Pr. 286.

[9] Nagle *v.* Macy, 9 Cal. 426. See Hunt *v.* Acre, 28 Ala. 580; Trenholm *v.* Wilson, *supra*.

against the estate of a deceased person for a year, or other specified time, after administration is taken upon his estate, do not suspend the right to prosecute a suit for foreclosure, when no judgment for a deficiency is sought.[1] The mortgagee may prove his claim and have it allowed against the estate of the mortgagor, and still proceed directly to foreclose.[2]

1585. Death of plaintiff. — Neither does the death of the plaintiff after judgment and before the sale give occasion to stay the sale or to revive the action.[3] Where, however, the plaintiff dies before judgment, this cannot be perfected in his name, but his representatives must be substituted in his place.[4]

1586. A day for payment, before the sale, is allowed by some courts by virtue of their equity jurisdiction.[5] The mortgagor cannot object to a decree giving him this right, although it be unauthorized by law.[6] A time for redemption after the sale is in some states provided for, and in such case the decree must not direct the delivery of the deed until this time has passed.[7] As regards redemption, the decree should make the same provisions for it whether the mortgage be in the usual form, or be merely an absolute deed without a formal defeasance or any defeasance at all.[8] Where redemption is allowed after sale, the officer is directed in the first place to execute a certificate to the purchaser, and, in case there is no redemption within the time allowed by law, to execute a deed.[9] In the mean time the mortgagor remains in possession, with no liability for rents and profits, or for use and occupation.[10]

In the absence of special provisions of statute, courts of equity may allow a period for redemption before a sale of the property,

[1] Willis *v.* Farley, 24 Cal. 490.

[2] Moores *v.* Ellsworth, 22 Iowa, 299. *Contra*, Falkner *v.* Folsom, 6 Cal. 412.

[3] Lynde *v.* O'Donnell, 21 How. (N. Y.) Pr. 34; *S. C.* 12 Abb. Pr. 286.

[4] Gerry *v.* Post, 13 How. (N. Y.) Pr. 118.

[5] Clark *v.* Reyburn, 8 Wall. 318; Capehart *v.* Biggs, 77 N. C. 261; Mebane *v.* Mebane, 80 N. C. 34. This was the practice in **Kentucky**. Durrett *v.* Whiting, 7 T. B. Mon. 547; Woodard *v.* Fitzpatrick, 2 B. Mon. 61; Richardson *v.* Parrott, 7 Ib. 379.

This is the practice in **Michigan**. Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430. The sale cannot take place within less than a year from the time all the defendants have been properly brought in. Burt *v.* Thomas, 49 Mich. 462.

[6] Smith *v.* Hoyt, 14 Wis. 252.

[7] Jones *v.* Gilman, 14 Wis. 450; Rhinehart *v.* Stevenson, 23 Ill. 524; Warner *v.* De Witt Co. Nat. Bank, 4 Bradw. (Ill.) 305.

[8] Briggs *v.* Seymour, 17 Wis. 255.

[9] Boester *v.* Byrne, 72 Ill. 466; Rosseel *v.* Jarvis, 15 Wis. 571; Walker *v.* Jarvis, 16 Wis. 28. A direction to execute "a certificate as required by law" is sufficient.

[10] Whitney *v.* Allen, 21 Cal. 233.

according to the circumstances of the case. This is always done in cases of strict foreclosure where the decree vests the complete title in the mortgagee.[1] The practice does not generally apply to cases of decrees for the sale of the property, because the debtor is then protected by his right to receive the surplus arising from the sale; but it has been extended by some courts to such cases.[2] As will be seen by reference to the statutes regulating foreclosure, it is in several states provided that there shall be a period of redemption after the sale, during which time the purchaser holds only a certificate of the sale entitling him to a deed at the close of the period if no redemption is made. In such case a decree that the sheriff shall execute a deed to the purchaser without waiting for the expiration of the time limited for redemption is erroneous, but may be amended.[3] The decree should embody the statutory provision for redemption; but an objection that the decree does not do this cannot be urged by creditors of the mortgagor or by his assignee in bankruptcy, except in connection with an offer to redeem.[4]

III. *The Conclusiveness of the Decree.*

1587. The validity of the decree cannot be attacked collaterally for mere irregularities which do not go to the jurisdiction;[5] and jurisdiction is presumed from the decree.[6] Though the decree be erroneous, the title of one who has in good faith purchased under it is not affected by the error; and this is so even though the decree should afterwards be reversed or set aside for error or irregularity.[7] So long as the decree remains in force the mortgagor, or any other person who was a party to the proceedings, is estopped from asserting any anterior right or title to

[1] Perine *v.* Dunn, 4 Johns. (N. Y.) Ch. 140.

[2] Harkins *v.* Forsyth, 11 Leigh (Va.), 294; Stockton *v.* Dundee Manuf. Co. 22 N. J. Eq. 56.

[3] Harlan *v.* Smith, 6 Cal. 173; Board of Education of Glynn Co. *v.* Franklin, 61 Ga. 303.

[4] Hards *v.* Conn. Mut. L. Ins. Co. 8 Biss. 234; Burley *v.* Flint, 9 Biss. 204.

[5] Gray *v.* Brignardello, 1 Wall. 627, 634; Ruggles *v.* First Nat. Bank of Centreville, 43 Mich. 192; Brown *v.* Phillips, 40 Mich. 264; Adams *v.* Cameron, 40 Mich. 506; Torrans *v.* Hicks, 32 Mich. 307; Ogden *v.* Walters, 12 Kans. 282; Reynolds *v.* Harris, 14 Cal. 667; Miller *v.* Sharp, 49 Cal. 233; Trope *v.* Kerns (Cal.), 20 Pac. Rep. 82; Berry *v.* King (Oreg.), 13 Pac. Rep. 772; Woolery *v.* Grayson (Ind.), 10 N. E. Rep. 935; Goltra *v.* Green, 98 Ill. 317.

[6] Markel *v.* Evans, 47 Ind. 326; Keller *v.* Miller, 17 Ind. 206.

[7] Horner *v.* Zimmerman, 45 Ill. 14; Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Burford *v.* Rosenfield, 37 Tex. 42.

the mortgaged lands.[1] The judgment is conclusive as to the title held by the defendants after it was rendered.[2]

If the mortgage was invalid in its origin, a decree of foreclosure has no effect whatever upon the property or its owners. Such was the case of a mortgage given by persons who claimed to be the trustees of a corporation and foreclosed; and afterwards it was established by decree of the court that the mortgagors had usurped the powers of the corporation, and had no authority to bind it.[3]

A decree of foreclosure entered before the debt has become due, or after the mortgage has been satisfied of record, is erroneous; and the decree should be set aside, unless in the latter case the entry of satisfaction be cancelled.[4]

1588. A judgment directing a sale of the mortgaged premises is conclusive as to all parties to the suit so long as it remains unreversed.[5] It does not matter that the plaintiff held the mortgage by assignment from the mortgagor as collateral security for a debt of his, and that he in this way had an interest in the mortgage; if the plaintiff, knowing this, makes him a party to the suit, and he does not answer, he cannot, after a judgment and sale of the property under it for a sum less than the debt for which the mortgage was held as collateral, maintain a bill to redeem. The interest of the mortgagor is not one prior to the mortgage, but one under the mortgage, and this is the ground upon which he is made a party to the foreclosure suit.[6]

Where the defendants have set up a claim under a title paramount to the mortgage, and the same has been litigated with the consent or acquiescence of both parties, both parties are bound by the judgment.[7]

Where a decree of sale provides that the sale shall be made subject to certain liens established or to be established by a reference to a master, as prior and superior liens, the purchaser cannot dispute the validity of the liens thus established, even on the

[1] Hefner *v.* Ins. Co. 123 U. S. 747; 8 Sup. Ct. Rep. 337; Adair *v.* Mergentheim, 114 Ind. 303; 16 N. E. Rep. 603; Ruff *v.* Doty (S. C.), 1 S. E. Rep. 707; Barton *v.* Anderson, 104 Ind. 578.

[2] Newcome *v.* Wiggins, 78 Ind. 306; Ulrich *v.* Drischell, 88 Ind. 354; Gaylord *v.* La Fayette (Ind.), 17 N. E. Rep. 899.

[3] Brindernagle *v.* German Reformed Church, 1 Barb. (N. Y.) Ch. 15.

[4] Russell *v.* Mixer, 39 Cal. 504.

[5] McCrackan *v.* Valentine, 9 N. Y. 42; Manigault *v.* Deas, Bailey, (S. C.) Eq. 283; Murrell *v.* Smith, 51 Ala. 301.

[6] Bloomer *v.* Sturges, 58 N. Y. 168.

[7] Helck *v.* Reinheimer, 105 N. Y. 470; Bundy *v.* Cunningham, 107 Ind. 360.

ground of fraud alleged to have been discovered after confirmation of the master's report fixing the amount of such liens.[1]

The decree is of course conclusive upon the defendant in the bill, and upon any purchaser from him who has purchased after the decree was rendered. In a contest with either by a purchaser at a judicial sale under the decree, the complainant's title to the mortgage is not an open question. His title to the mortgage was essential to the decree rendered, and was necessarily adjudicated as a part of the case then before the court.[2]

After a long lapse of time since the decree was made, the court will presume, as against parties calling the decree in question, that every act and thing was done, necessary to give jurisdiction and authority to the court pronouncing the decree, which the record does not show was not done, particularly when the record produced shows that all of the record and proceedings have not been produced.[3]

1589. Prior and adverse rights. — Where a party has a right under the mortgage, and also a right prior to it, he is not precluded in respect to the prior right by a judgment of foreclosure, though the terms of it are broad enough to cover both rights. Only the rights and interests under the mortgage and subsequent to it can properly be litigated upon a bill of foreclosure.[4] One claiming adversely to the title of the mortgagor cannot be made a party to the suit for the purpose of trying his adverse claim. If he has a claim under the mortgage also, his claim prior to it cannot be divested by the decree. This prior claim is not a subject matter of litigation in the foreclosure suit, and remains unaffected by it. The decree is final only within the proper scope of the suit, which is to bar interests in the equity of redemption.[5] Therefore, where land was devised to one in trust to receive the rents and profits, and apply to the benefit of another for life, remainder to the trustee in fee for his own benefit, and the remainder-man and the tenant for life made a mortgage in which no allusion was

[1] Swann *v.* Wright, 110 U. S. 590.

[2] §§ **1440, 1445, 1474**; Gunn *v.* Wades, 62 Ga. 20.

[3] Kibbe *v.* Dunn, 5 Bass. 233; Chesebro *v.* Powers (Mich.), 38 N. W. Rep. 283.

[4] Wade *v.* Miller, 32 N. J. L. 296; Elliott *v.* Pell, 1 Paige (N. Y.), 263; Eagle Fire Co. *v.* Lent, 6 Paige (N. Y.), 635; Holcomb *v.* Holcomb, 2 Barb. (N. Y.) 20; Frost *v.* Koon, 30 N. Y. 428; Lewis *v.* Smith, 11 Barb. (N. Y.) 152; *S. C.* 9 N. Y. 502; Corning *v.* Smith, 6 N. Y. 82; Lee *v.* Parker, 43 Barb. (N. Y.) 611; Lansing *v.* Hadsall, 26 Hun (N. Y.), 619.

[5] Lewis *v.* Smith, 9 N. Y. 502; McComb *v.* Spangler (Cal.), 12 Pac. Rep. 347, quoting text; Bozarth *v.* Landers, 113 Ill. 181.

made to the trust, it was held, upon a foreclosure of the mortgage, that the trust estate was not affected by the mortgage, or by the judgment of foreclosure, although the person named as trustee was in his individual capacity a party to the suit. The prior estate for life in trust not being subject to the mortgage, or within the power of the trustee to dispose of, remains unaffected.[1] In like manner if there be an outstanding right of dower in the wife of the mortgagor, the making of her a party to an action of foreclosure, and the rendering of a judgment foreclosing the rights of the defendants in the premises, do not affect this right. This remains the same as if she had not been made a party to the action.[2] If, however, the mortgage be given to secure the purchase money, the wife's dower is then subordinate to the mortgage, and is barred if she be made a party.[3] Moreover, the decree is final and conclusive only against the owner and subsequent parties in interest, when they have been made parties to the suit; and is unavailing against any one interested in the premises who was not made a party,[4] and in such case the decree is no bar to another foreclosure suit.[5]

It is held, however, that if a party like a contingent remainderman having a prior interest is made a party to the foreclosure suit, and without demurring, answering, or asserting his prior title, allows judgment to be taken, and the facts stated in the bill are such that, if admitted, his title is subject to the mortgage and to the foreclosure, he is estopped from afterwards setting up his interest as against the judgment.[6]

A controversy between defendants to a foreclosure suit, as to which of them is the principal debtor and which is surety, cannot be determined in such suit, and a decree which attempts to do so is of no effect.[7]

IV. *The Amount of the Decree.*

1590. The decree directing a sale of the premises should find the exact amount due on the mortgage, and not leave this

[1] Rathbone *v.* Hooney, 58 N. Y. 463.

[2] Wade *v.* Miller, 32 N. J. L. 296; Merchants' Bank *v.* Thomson, 55 N. Y. 7.

[3] Brackett *v.* Baum, 50 N. Y. 8. This decision relates to a power of sale mortgage foreclosed under the statute, but the reasoning applies here.

[4] Shores *v.* Scott River Co. 21 Cal. 135; Goodenow *v.* Ewer, 16 Cal. 461.

[5] Curtis *v.* Gooding, 99 Ind. 45.

[6] Goebel *v.* Iffla (N. Y.), 18 N. E. Rep. 649; Jordan *v.* Van Epps, 85 N. Y. 427; Barnard *v.* Onderdonk, 98 N. Y. 158.

[7] Hovenden *v.* Knott, 12 Oreg. 267.

to be calculated by the officer.[1] A decree which simply orders the payment of the sum due on the mortgage debt, without finding the amount, is erroneous.[2] Where several mortgages upon separate parcels of land are foreclosed together, the decree must find the amount due upon each, and not the aggregate amount secured by all.[3] The parties themselves may fix the amount by agreement, and this will be adopted by the court in entering the decree.[4] If the mortgagee has received payments upon collateral securities or rents and profits from the mortgaged premises, an accounting to ascertain the sum due should precede the decree.[5] If the mortgage was drawn for a larger sum than the actual debt secured, the decree should be for the correct amount of the debt.[6] The amount due may be determined by the court,[7] or for its convenience reference may be made to a master or clerk of court, or other officer, to ascertain the amount.[8] A part of the debt not due cannot be included.[9] But an instalment falling due before the hearing, although not due when the suit was brought, may be included.[10]

A judgment by default cannot be entered for a larger amount than the complaint shows to be due.[11]

Though the debt secured by the mortgage be made up of several amounts, as where the mortgagee has paid taxes or other liens upon the property for his own protection, the whole amount due and payable at the time of the foreclosure should be included in the decree. The different items of the debt cannot be separated and collected by several actions.[12]

If the mortgagor desires an account taken of the amount of profits received by the mortgagee in possession, he should ask the action of the court in session, and upon a hearing by the court or

[1] Wernwag *v.* Brown, 3 Blackf. (Ind.) 457; Champlin *v.* Foster, 7 B. Mon. (Ky.) 104; Warner *v.* De Witt Co. Nat. Bank, 4 Bradw. (Ill.) 305. As to certainty in the amount of the decree, see Mulvey *v.* Gibbons, 87 Ill. 367.

[2] Tompkins *v.* Wiltberger, 56 Ill. 385; Wilson Sewing Machine Co. *v.* Rutledge, 50 Iowa, 39.

[3] Rader *v.* Ervin, 1 Mont. T. 632; Collier *v.* Ervin, 2 Ib. 335.

[4] Kelly *v.* Searing, 4 Abb. (N. Y.) Pr. 54; Nosler *v.* Haynes, 2 Nev. 53; Clarke *v.* Bancroft, 13 Iowa, 320.

[5] Parlin *v.* Stone, 1 McCrary, 443.

[6] Laylin *v.* Knox, 41 Mich. 40.

[7] Vaughn *v.* Nims, 36 Mich. 297; Rollins *v.* Forbes, 10 Cal. 299; and see Davis *v.* Alvord, 94 U. S. 545.

[8] Ireland *v.* Woolman, 15 Mich. 253.

[9] King *v.* Longworth, 7 Ohio, 585.

[10] Manning *v.* McClurg, 14 Wis. 350; Carr *v.* Watkins (Ky.), 9 S. W. Rep. 218.

[11] Savings & Loan Soc. *v.* Horton, 63 Cal. 105.

[12] Johnson *v.* Payne, 11 Neb. 269.

before a master should offer his proof.[1] The question of the mortgagee's liability to account for rents and profits should be raised by the pleadings, otherwise the master, under an order of reference, will not without special directions entertain it.[2]

The full amount of the mortgage debt may be recovered as against a junior incumbrancer, though the mortgagee has agreed to sell the mortgage to the wife of the mortgagor at a discount.[3]

1591. Ordinarily the decree cannot include any instalment of the mortgage debt not due at the time;[4] though if an instalment not due when the suit was commenced falls due before the decree is entered, the amount of it is properly included.[5] When only a portion of the debt is due, the judgment, besides finding the amount actually due at the time it is entered, should find, also, the amount secured by the mortgage not then due, and should provide for a stay of proceedings, if, before the day of sale, the mortgagor pay the amount with costs.[6] But whether the amount not due should be stated or not depends upon the statutes and practice of the different states.[7]

When by the terms of the mortgage the mortgagee may, upon a default, elect to consider the entire amount of the mortgage debt as due, and he notifies the mortgagor of his election so to consider it before filing a bill for foreclosure, he is entitled to a decree for the full amount, although only a part of the debt is due.[8]

1592. Collateral mortgage. — If a mortgage made without consideration paid by the mortgagee be assigned by the latter as indemnity against the assignee's liability as indorser for the mortgagor, it is of course security only for the amount the indorser has been obliged to pay, and on foreclosure the decree should be for that amount only.[9] When a mortgage given to indemnify

[1] Hards *v.* Burton, 79 Ill. 504; and see Roberts *v.* Pierce, 79 Ill. 378.

[2] Wycoff *v.* Combs, 28 N. J. Eq. 40.

[3] Knox *v.* Moser, 69 Iowa, 341.

[4] King *v.* Longworth, 7 Ohio, 585. See § 1478.

[5] Howe *v.* Lemon, 37 Mich. 164; Vaughn *v.* Nims, 36 Mich. 297; Johnson *v.* Van Velsor, 43 Mich. 208; Malcolm *v.* Allen, 49 N. Y. 448; Ferguson *v.* Ferguson, 2 N. Y. 360, 364; Asendorf *v.* Meyer, 8 Daly (N. Y.), 278; Manning *v.* McClurg, 14 Wis. 350; Hanford *v.* Robertson, 47 Mich. 100; Cooke *v.* Pennington, 15 S. C. 185.

[6] Rice *v.* Cribb, 12 Wis. 179. See, also, as to the practice in such cases, Walker *v.* Hallett, 1 Ala. 379; Taggart *v.* San Antonio Ridge Ditch & Mining Co. 18 Cal. 460.

[7] Hoffman on Referees, p. 229.

[8] Noonan *v.* Lee, 2 Black, 499; Noyes *v.* Clark, 7 Paige (N. Y.), 180.

[9] Van Deventer *v.* Stiger, 25 N. J. Eq

sureties is foreclosed, while suit is pending on the claim indemnified against, the decree may properly direct payment of the proceeds of sale into court, to await further order of court.[1]

If the complainant holds the mortgage assigned to him as collateral security for a specific debt of less amount than the mortgage, he can only have a decree for that debt, although pending the suit the mortgage is assigned to him absolutely. His remedy for the residue is by a supplemental bill; or in case the whole premises are sold upon the decree in the original suit, he might have remedy by petition for the surplus.[2]

And so if one holding a mortgage as collateral security at the request of the mortgagor, who owes the principal debt, assigns the mortgage to a third person for a sum less than the face of the mortgage, which sum is credited on the principal debt, and the mortgagor subsequently pays the balance of this debt, the mortgage in the hands of the assignee can be enforced for only the amount he paid for it either as against the mortgagor or against subsequent incumbrancers at the time of the assignment, for in such case that amount is the only part of the mortgage remaining unpaid.[3]

1593. If the mortgage secures a bond, the decree may be entered for the full amount of principal and interest due upon the bond, though it exceeds the amount of the penalty.[4] Even when the suit is founded on the bond alone, the plaintiff may recover the full amount of the penalty as a debt, and interest in addition, as damages for the detention of the debt.[5] When the suit is not upon the bond, but is a proceeding in equity upon the mortgage given to secure the bond, it has been considered that the lien upon the land is for the whole debt, both principal and interest, according to the condition of the mortgage. "The mortgage," says Sir William Grant,[6] "is to secure payment, not of

224; Handy *v.* Sibley (Ohio), 17 N. E. Rep. 329.

[1] Hunter *v.* Levan, 11 Cal. 11.

[2] Underhill *v.* Atwater, 22 N. J. Eq. 16.

[3] Hoy *v.* Bramhall, 19 N. J. Eq. 74.

[4] Long *v.* Long, 16 N. J. Eq. 59. But see Harper *v.* Barsh, 10 Rich. (S. C.) Eq. 149; Mower *v.* Kip, 6 Paige (N. Y.), 88, reversing *S. C.* 2 Edw. (N. Y.) 165.

[5] Long *v.* Long, *supra*, and cases cited here.

[6] Clarke *v.* Abingdon, 17 Ves. 106. Mr. Chancellor Green, in Long *v.* Long, *supra*, says, in reference to this distinction: "Looking at the question as a mere question of equity, it will be found very difficult to assign a satisfactory reason why the obligee should be permitted to recover a larger amount upon the mortgage, which is a mere security for the bond, than he is permitted to recover upon the bond itself."

In Cruger *v.* Daniel, 1 McMull (S. C.) Eq. 157, the Chancellor, referring to

a bond, but of the sum for which the bond was given, together with all interest that may grow due thereon. The same sum, therefore, is differently secured by different instruments; by a penalty and by a specific lien. The creditor may resort to either, and if he resorts to the mortgage the penalty is out of the question."

The American cases go further than this, and hold that the real debt is the sum specified in the condition of the bond, with interest, and that the penalty is a mere matter of form in the instrument declaring the debt. This is the view taken by Chancellor Walworth, and followed in other cases. "The amount secured by the condition of the bond is the real debt, which he was both legally and equitably bound to pay. And if he neglects to pay the money when it becomes due, there is no rule of justice or common sense which should excuse him from the payment of the whole amount of the principal and interest, whether it be more or less than the former penalty of the bond." [1]

A decree for the amount of the face of a bond with interest, when the bond is in double the true amount of the debt, is erroneous, and a sale under it will be enjoined.[2]

1594. Interest. — The decree should be for the amount of the debt with interest thereon if it bears interest. If the interest has been paid by a note of the mortgagor, and this remains outstanding, the amount of such note should be included in the decree, not only as against the mortgagor, but as well against subsequent incumbrancers, although the interest is indorsed on the mortgage note as paid.[3] If the debt does not bear interest the decree should not include interest.[4]

He may be allowed interest upon amounts paid for taxes and other claims upon the property; but he should not be allowed more than the legal or usual rate of interest as against a junior incumbrancer, though he may have an agreement with the mortgagor for a higher rate of interest.[5]

Clarke *v.* Abingdon, very justly remarks that the mortgage there did not secure the bond, nor did it secure or refer to the penalty; and he holds that when the mortgage expressly refers to the bond and states the penalty, this is the entire debt secured, and the judgment cannot go beyond it.

[1] Mower *v.* Kip, 6 Paige (N. Y.), 88; approved in Long *v.* Long, 16 N. J. Eq. 59; in which case Chancellor Green fully reviews the decisions.

[2] Scriven *v.* Hursh, 39 Mich. 98.

[3] See § 925; Frink *v.* Branch, 16 Conn. 260.

[4] Heydle *v.* Hazlehurst, 4 Bibb (Ky.), 19.

[5] Butterfield *v.* Hungerford, 68 Iowa, 249.

Interest upon a purchase money mortgage upon land to which the mortgagee had no title till long after his conveyance to the mortgagor, should only be allowed from the time the mortgagee made the title valid and effectual, unless the mortgagor has derived a profit from the possession and use of the property; and not even in that case if it appears that the use of the land was of value to the mortgagor by reason of improvements made by him upon the land.[1]

1595. Exchange. — No allowance can be made for the difference of exchange, though the mortgage loan was negotiated in a foreign country where the mortgagee resides.[2]

1596. Insurance. — Premiums paid by the mortgagee for insurance against fire are a charge upon the premises if the mortgagor has expressly made them such; but if paid without such agreement, they cannot be allowed in the judgment.[3] They are, in such case, paid merely for the mortgagee's own security. Premiums for insurance paid after the commencement of the action will not be allowed except upon a supplemental complaint.[4]

Doubtless provision might be made in the decree for reimbursing the mortgagee for money paid by him for insurance during the year allowed by statute for redemption before sale, where the mortgage contains covenants that the mortgagor would keep the premises insured, or that in case of his failure to insure the mortgagee might do so, and that the premiums should become part of the mortgage debt. But if no provision be inserted in the decree authorizing the sheriff to pay, out of the proceeds of the sale, any sums which the mortgagee might be compelled to pay thereafter to keep the property so insured during the year allowed by the statute for redemption before sale, the court has no authority, after a sale of the land for the exact amount specified in the judgment, to enter further judgment or order for the amount so paid by the mortgagee for insurance against the parties personally liable for the mortgage debt, and award execution therefor.[5]

[1] Toms *v.* Boyes, 59 Mich. 386.

[2] Chapman *v.* Robertson, 6 Paige (N. Y.), 627. See § **637**.

[3] See § **414**; Faure *v.* Winans, Hopk. (N. Y.) Ch. 283; Burgess *v.* Southbridge Sav. Bank (C. C. Mass. 1880), 2 Fed. Rep. 500.

One bondholder paying the premiums to preserve the security, though without the knowledge of the other bondholders, has a lien for the amount paid. McLean *v.* Burr, 16 Mo. App. 240.

[4] Washburn *v.* Wilkinson, 59 Cal. 538.

[5] Northwestern Mut. Life Ins. Co. *v.* Drown, 15 Wis. 419.

If the mortgage be of a leasehold estate, the decree may include rent paid by the mortgagee for the protection of the estate.[1]

1597. Taxes. — A mortgagee cannot charge to the mortgagor, or have included in a decree in a foreclosure suit, the amount he has paid as taxes on his mortgage as for money at interest. He is as much bound to pay the tax upon this as upon his other property.[2] But he may be allowed for payments made upon taxes assessed upon the land, and which are a charge upon it, properly payable by the mortgagor.[3] The bill should contain a proper allegation and prayer in regard to taxes, otherwise the decree cannot properly direct an application of the proceeds of a sale to the payment of the delinquent taxes.[4] An allowance for taxes cannot be made under a general prayer for relief.[5] When the taxes remain outstanding and unpaid, the decree may, upon the application of the plaintiff, properly direct that the taxes due on the property be first paid out of the proceeds of the sale.[6] In rendering judgment for a deficiency against a purchaser who has assumed the payment of a mortgage, it is proper that the taxes due upon the property should be deducted from the proceeds of the sale before ascertaining the deficiency, for it is the duty of the purchaser to see that the taxes are paid.[7] But after trial in the foreclosure suit, and without notice to the mortgagors, it is error to include the taxes in a judgment entered merely upon the production of the tax receipt.[8]

If the taxes were illegally assessed and the payment thereof might have been successfully resisted, the mortgagee will not be allowed to recover them.[9]

If money has been paid under a foreclosure judgment upon an assessment which is afterwards vacated, the payment being out of

[1] Robinson *v.* Ryan, 25 N. Y. 320.

[2] Pond *v.* Causdell, 23 N. J. Eq. 181.

[3] See §§ **1134, 1683**; Faure *v.* Winans, Hopk. (N. Y.) 283; Silver Lake Bank *v.* North, 4 Johns. (N. Y.) Ch. 370; Rapelye *v.* Prince, 4 Hill (N. Y.), 119; Burr *v.* Veeder, 3 Wend. (N. Y.) 412; De Leuw *v.* Neely, 71 Ill. 473; Vaughn *v.* Nims, 36 Mich. 297; Johnson *v.* Payne, 11 Neb. 269; Southard *v.* Dorrington, 10 Neb. 119; Seaman *v.* Huffaker, 21 Kans. 254; Johnson *v.* Payne (Neb. 1881), 9 N. W. Rep. 81.

[4] De Leuw *v.* Neely, *supra.*

[5] Brown *v.* Miner, 21 Ill. App. 60.

[6] Poughkeepsie Sav. Bank *v.* Winn, 56 How. (N. Y.) Pr. 368; Opdyke *v.* Crawford, 19 Kans. 604; Easton *v.* Pickersgill, 55 N. Y. 310; Tuck *v.* Calvert, 33 Md. 209, 224; Ketcham *v.* Fitch, 13 Ohio St. 201; Harris *v.* McCrossen, 31 Kan. 402.

[7] Fleishhauer *v.* Doellner, 60 How. (N. Y.) Pr. 438.

[8] Northwestern Mut. Life Ins. Co. *v.* Allis, 23 Minn. 337.

[9] Atwater *v.* West, 28 N. J. Eq. 361.

money to which the mortgagor would be entitled, as surplus money after sale, he is entitled to recover the money so paid.[1]

If the mortgagee has taken a tax title for the purpose of protecting the mortgage, the decree may properly provide that on payment of the cost of the tax title with interest the mortgagee shall assign the tax title.[2]

Where a judgment entered upon the foreclosure of a second mortgage provided that out of the moneys arising from the sale there should be deducted any liens on the premises for taxes, but the whole amount realized at the sale was paid to the mortgagee without deducting or paying the taxes, in an action by the first mortgagee, after foreclosing his mortgage against the second mortgagee who had purchased at the previous sale, to recover the amount paid for taxes upon the premises, it was held that he was not entitled to recover. The first mortgagee not having been a party to the judgment upon the second mortgage, he was not entitled to enforce its provisions.[3]

The purchaser of the property at the foreclosure sale has the right to insist upon the payment of the taxes in accordance with the judgment.[4]

1598. Costs incurred in a previous action at law upon the note, and the expenses of a suit prosecuted in good faith to collect the debt out of personal property assigned as collateral security for the same debt, should be allowed in the decree as a part of the mortgage debt.[5]

1599. The disbursements made by the plaintiff in the proceedings for foreclosure, if legally and properly made, are always allowed to him, though not strictly costs.[6]

Payments made by the plaintiff, to protect his interest by redeeming from prior incumbrances, may be tacked to his own mortgage debt.[7] Inasmuch as the junior mortgagee is thus subrogated to the prior mortgage, his decree should include interest on that mortgage at the rate borne by it to the date of the decree.[8]

If the mortgagee in possession has made repairs or improve-

[1] Brehm *v.* New York (N. Y.), 10 N. E. Rep. 158.

[2] Baker *v.* Clark, 52 Mich. 22.

[3] Mut. Life Ins. Co. *v.* Sage, 28 Hun (N. Y.), 595; 41 Ib. 535.

[4] People *v.* Bergen, 53 N. Y. 404.

[5] See § 1084; Pettibone *v.* Stevens, 15 Conn. 19.

[6] Benedict *v.* Warriner, 14 How. (N. Y.) Pr. 568.

[7] Mosier *v.* Norton, 83 Ill. 519; Kelly *v.* Longshore, 78 Ala. 203.

[8] Mosier *v.* Norton, *supra.*

ments for which he is entitled to compensation, or if a purchaser under an imperfect foreclosure, who is in effect a mortgagee in possession, makes such repairs or improvements, he should ask to have them allowed for in the decree. If the decree is entered without including any claim for repairs, another bill cannot be brought to make them a charge upon the property. The decree as entered is conclusive of the amount due on the mortgage.[1]

1600. Final judgment. — A judgment which settles all the rights of the parties and directs a sale of the premises, and that the defendant pay any deficiency which may arise after such sale, is a final decree from which an appeal may be taken; though in a limited sense it is interlocutory, inasmuch as further proceedings are necessary to carry it into effect.[2] It leaves nothing further to be adjudicated.[3] It is no objection to such judgment that it was not rendered by a court composed of the same judges who rendered the preliminary judgment, ascertaining and settling the rights of the parties and ordering judgment.[4] The judgment for a deficiency is entered upon the coming in, and confirmation of, the report of the sale without any further application to the court. The execution issues by virtue of the judgment for foreclosure.[5] Nothing remains to be judicially determined, and an appeal may be taken at once.[6]

A decree determining the amount of the mortgage debt, and ordering a sale unless the same is paid by a day named, but also making a reference to a master to report the amount of prior liens, a detailed statement of the several properties covered by the mortgage, and a statement as to the order of sale and as to the form of the advertisement, is not a final decree from which an appeal may be taken.[7]

An appeal is the proper remedy for any errors in substance of the decree, or in the directions for carrying it into execution;[8]

[1] Dewey *v.* Brownell, 54 Vt. 441; 41 Am. Rep. 852.

[2] Grant *v.* Phœnix Ins. Co. 106 U. S. 429, 431; 1 Sup. Ct. Rep. 414; Malone *v.* Marriott, 64 Ala. 486; Dodge *v.* Allis, 27 Minn. 376.

[3] Morris *v.* Morange, 38 N. Y. 172; *S. C.* 4 Abb. Pr. N. S. 447; Bolles *v.* Duff, 43 N. Y. 469; *S. C.* 10 Abb. Pr. N. S. 399; 41 How. Pr. 355; Hipp *v.* Huchett, 4 Tex. 20; Dodge *v.* Allis, 27 Minn. 376.

[4] Chamberlain *v.* Dempsey, 36 N. Y. 144, reversing *S. C.* 9 Bosw. 540.

[5] Bicknell *v.* Byrnes, 23 How. (N. Y.) 486.

[6] Bolles *v.* Duff, *supra;* Morris *v.* Morange, *supra.*

[7] Parsons *v.* Robinson (U. S.), 7 Sup. Ct. Rep. 1153; Railroad Co. *v.* Swasey 23 Wall. 405, 409; Bostwick *v.* Brinkerhoff, 106 U. S. 3; 1 Sup. Ct. Rep. 15.

[8] Barnard *v.* Bruce, 21 How. (N. Y.) Pr. 360.

but the court has control of the judgment, though final, and may on proper application change the provisions of it, or insert other provisions for the benefit of any of the parties to the action.[1]

After a decree from which no appeal is taken, and after a sale under such decree, a mortgagor, who was a party to the foreclosure suit, is estopped by the decree from maintaining a suit to recover possession of the property on the ground that the mortgage was invalid. The question of the validity of the mortgage is *res adjudicata*.[2]

A judgment of foreclosure and a judgment for a deficiency are each appealable; but both judgments cannot be included in one appeal.[3]

1601. No stay of proceedings can be had on account of a controversy between subsequent incumbrancers. In case of an appeal from a decree of sale on a bill to foreclose a mortgage, the amount of which and of other mortgages upon the property are not disputed, though there is a controversy about the validity of certain judgments subsequent to the mortgages, the court will not stay proceedings under the decree, but will order the surplus money to be brought into court to abide its decision; for in such case, if the decree should be reversed, the mortgagor cannot be prejudiced, while the mortgage creditors would be prejudiced by a delay in recovering their claims.[4]

V. *Costs.*

1602. In general. — The mortgagee in a foreclosure suit as in other cases is ordinarily entitled to his costs of suit, when he prevails and obtains a decree, whether he be complainant or defendant.[5] If, however, he has acted oppressively in demanding a larger sum than was due on his mortgage, and the mortgagor has been diligent in endeavoring to ascertain from him the amount of the incumbrance in order to pay it, costs will be denied to him, or possibly, in some cases, awarded against him;[6] but merely

[1] Livingston *v.* Mildrum, 19 N. Y. 440.

[2] Robinson *v.* Walker (Ala.), 1 So. Rep. 347.

[3] Ballou *v.* Chicago & N. W. Ry. Co. 53 Wis. 150; Olinger *v.* Liddle, 55 Wis. 621.

[4] Schenck *v.* Conover, 13 N. J. Eq. 31.

[5] Loftus *v.* Swift, 2 Sch. & Lef. 642; Bartle *v.* Wilkin, 8 Sim. 238; Witherell *v.* Collins, 3 Madd. 255; Concklin *v.* Coddington, 12 N. J. Eq. (1 Beas.) 250; Benedict *v.* Gilman, 4 Paige (N. Y.), 58; and without reference to his success. Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48; Vroom *v.* Ditmas, 4 Ib. 526.

[6] Detillin *v.* Gale, 7 Ves. 583; Large *v.*

claiming in good faith a larger sum than the court finally decides that he is entitled to is no ground for refusing him his costs.[1] He may be made to pay costs if he has rejected a tender of the full amount due him;[2] or if the litigation has in any way been occasioned by his misconduct.

1603. The matter of costs depends very much upon the statutes and practice of the several states, which are quite unlike. The foreclosure suit being an equitable one, the costs are generally within the discretion of the court.[3] But although there is no fixed rule for giving costs as in courts of law, the courts rarely, if ever, refuse costs.[4] The disbursements made for carrying on the suit are not strictly costs; but if they are legally made and are of a reasonable amount they are allowed to the party making them.[5] Provision is sometimes made that a plaintiff may serve upon a defendant a notice that no personal claim is made upon him; and that in such case no service of the complaint by copy need be made on such defendant; and then in case he unnecessarily defends, he is liable in costs to the plaintiff.[6] If a copy of the complaint be served, no notice for this purpose is required.[7]

Where a mortgage secures debts to two persons and one of them claims a foreclosure decree and sale at his own expense, he is entitled to costs out of the fund, or by contribution from the other who accepted the benefit of his efforts.[8]

1604. If subsequent incumbrancers unnecessarily appear and answer, they are not entitled to costs until after the plaintiff's debt and costs are satisfied;[9] and it is not necessary that they should appear to a foreclosure suit if their claims are correctly set

Van Doren, 14 N. J. Eq. 208; Vroom *v.* Ditmas, 4 Paige (N. Y.), 526; Van Buren *v.* Olmstead, 5 Ib. 9.

[1] Loftus *v.* Swift, 2 Sch. & Lef. 642.

[2] Pratt *v.* Stiles, 9 Abb. (N. Y.) Pr. 150; *S. C.* 17 How. Pr. 211.

In **New York** it was formerly held that a tender made no difference in the amount of the costs. Bartow *v.* Cleveland, 16 How. (N. Y.) Pr. 364; *S. C.* 7 Abb. Pr. 339; Pratt *v.* Ramsdell, 16 How. (N. Y.) Pr. 59, 62; *S. C.* 7 Abb. Pr. 340, n.; Stevens *v.* Veriane, 2 Lans. (N. Y.) 90. But these cases are overruled in Bathgate *v.* Haskin, 63 N. Y. 261.

[3] Garr *v.* Bright, 1 Barb. (N. Y.) Ch. 157; O'Hara *v.* Brophy, 24 How. (N. Y.) Pr. 379; Bartow *v.* Cleveland, *supra;* Pratt *v.* Ramsdell, *supra;* Gallagher *v.* Egan, 2 Sandf. (N. Y.) 742; Lossee *v.* Ellis, 13 Hun (N. Y.), 655.

[4] Stevens *v.* Veriane, *supra;* Eastburn *v.* Kirk, 2 Johns. (N. Y.) Ch. 317; Garr *v.* Bright, *supra.*

[5] Benedict *v.* Warriner, 14 How. (N. Y.) Pr. 568.

[6] Code of N. Y. §§ 131, 157.

[7] O'Hara *v.* Brophy, *supra.*

[8] Currie *v.* Bittenbinder (N. J.), 7 Atl. Rep. 872; Trustees *v.* Greenough, 105 U. S. 527, 532, per Bradley, J.

[9] Merchants' Ins. Co. *v.* Marvin, 1 Paige (N. Y.), 557; Barnard *v.* Bruce, 21 How. (N. Y.) Pr. 360.

forth in the bill, as their rights will be fully protected under the decree. Where the court has discretionary powers in regard to costs, and the appearance of such incumbrancers though proper is not necessary, the plaintiff, upon receiving the amount due him after he has brought suit, may discontinue against subsequent incumbrancers who have appeared, without costs to them.[1] Ordinarily, however, a subsequent mortgagee would be entitled to costs in such case.[2] If a second mortgagee, after being made a party to a suit to foreclose a prior mortgage, receives payment and offers to disclaim, he is entitled to his costs.[3]

A subsequent purchaser of the premises may make himself personally liable for costs, though not liable for the debt, if he makes an unreasonable and unfounded defence to the suit, and the property is not of sufficient value to pay the incumbrances.[4]

If a second mortgagee, upon a bill to foreclose his mortgage upon several lots, makes the holders of the prior mortgages upon these lots parties, and they appear and prove their claims, the costs of obtaining the decree, as well as the costs of sale, should be borne by all the parties who accept the benefit of the proceedings, in proportion to the respective amounts received by them, although not enough be received to pay the prior mortgages in full.[5]

1605. Defendants who properly appear and answer are entitled to costs as a general rule. But several defendants having the same defence and employing the same solicitor are not allowed to swell the costs by filing separate answers.[6] A prior mortgagee, whether properly made a party for the purpose of having the amount of his claim ascertained,[7] or whether improperly joined, is entitled to costs, to be paid out of the fund in the one case, or in the other by the plaintiff personally.[8]

1606. Attorney's fees.[9] — A reasonable fee for the expense of foreclosing beyond the costs allowed by law may be contracted for

[1] Gallagher *v.* Egan, 2 Sandf. (N. Y.) 742.

[2] Young *v.* Young, 17 N. J. Eq. 161.

[3] Day *v.* Gudgen, L. R. 2 Ch. Div. 209.

[4] Danbury *v.* Robinson, 14 N. J. Eq. 324.

[5] Scott *v.* Somers (N. J.), 9 Atl. Rep. 718.

[6] Danbury *v.* Robinson, *supra.*

[7] Chamberlain *v.* Dempsey, 36 N. Y. 144, 147; Boyd *v.* Dodge, 10 Paige (N. Y.), 42; Berlin Building & Loan Asso. *v.* Clifford, 30 N. J. Eq. 482.

[8] Millandon *v.* Brugiere, 11 Paige (N. Y.), 163.

[9] A stipulation for attorney's fees is valid in: —

Dakota: Bank *v.* Rasmussen, 1 Dak. 60.

Indiana: Johnson *v.* Hosford, 10 N. E. Rep. 407; Billingsley *v.* Dean, 11 Ind. 331.

Iowa: Sperry *v.* Horr, 32 Iowa, 184; Weatherby *v.* Smith, 30 Iowa, 131.

in the mortgage; and the court will consider the amount stipulated for by the parties to be reasonable, unless it be extravagantly large and extortionate. A percentage may be allowed instead of a fixed sum as a fee.[1] But no allowance will be made in the decree for such fees after default; even when provided for in the mortgage, unless claim is made for them in the bill.[2] The allowance of a larger sum than that stipulated for in the mortgage is erroneous.[3] If in the provision for attorney's fees the amount is left blank, a reasonable fee may be allowed by the court.[4]

A stipulation in a mortgage allowing counsel fees for a foreclosure does not entitle the plaintiff to counsel fees unless he has paid them or become liable for them;[5] he cannot recover such fees for personally prosecuting his foreclosure.[6] It is not necessary that there should be any averment that the amount of fees stipulated for in the deed is reasonable, as they are a mere incident to the cause of action, and may be fixed by the court at its discretion.[7] If there be no stipulation in the mortgage for coun-

Illinois: Clawson *v.* Munson, 55 Ill. 394; Barry *v.* Guild, 18 N. E. Rep. 759.

Kansas: Seaton *v.* Scovill, 18 Kans. 433, 435; Howestein *v.* Barnes, 5 Dill. 482; 29 Am. Rep. 406.

Minnesota: Jones *v.* Radatz, 27 Minn. 240; Griswold *v.* Taylor, 8 Minn. 342.

Missouri: Bank *v.* Gay, 63 Mo. 33.

Louisiana: Dietrick *v.* Bayhi, 23 La. Ann. 767; Mullan *v.* His Creditors, 2 So. Rep. 45.

Florida: L'Engle *v.* L'Engle, 21 Fla. 131.

Idaho: Broadbent *v.* Brumback, 16 Pac. Rep. 555.

Nevada: Cox *v.* Smith, 1 Nev. 161.

Pennsylvania: Woods *v.* North, 84 Pa. St. 407, 410; Johnston *v.* Speer, 92 Pa. St. 227.

Wisconsin: Morgan *v.* Edwards, 53 Wis. 599.

Georgia: National Bank *v.* Danforth, 7 S. E. Rep. 546; Merck *v.* Mortgage Co. Ib. 546.

Alabama: Munter *v.* Linn, 61 Ala. 492.

In **Michigan** a stipulation in a mortgage to pay an attorney's fee is unlawful and void. It is regarded as a penalty. Bullock *v.* Taylor, 39 Mich. 137; Van Marter *v.* McMillan, 39 Mich. 304; Myer *v.* Hart, 40 Mich. 517; Vosburgh *v.* Lay, 45 Mich. 455; Botsford *v.* Botsford, 49 Mich. 29; Bendey *v.* Townsend, 109 U. S. 665.

Void also in **Ohio**: State *v.* Taylor, 10 Ohio, 378; Shelton *v.* Gill, 11 Ohio, 417; Spalding *v.* Bank, 12 Ohio, 544; Martin *v.* Bank, 13 Ohio, 250; and in **Kentucky**: Thomasson *v.* Townsend, 10 Bush, 114; Rilling *v.* Thompson, 12 Bush, 310.

[1] See §§ **359, 635, 1923**; Cox *v.* Smith, *supra*; McLane *v.* Abrams, 2 Nev. 199. In this case a stipulation for ten per cent. on the amount of the mortgage, $6,000, was not regarded as unreasonable. In Daly *v.* Maitland, 88 Pa. St. 384; *S. C.* 13 West. Jur. 204, a stipulation for a commission of five per cent. on a mortgage of $14,000 was considered to be unreasonable. See Balfour *v.* Davis, 14 Oreg. 47.

[2] Augustine *v.* Doud, 1 Bradw. (Ill.) 588.

[3] Palmeter *v.* Garey, 63 Wis. 426.

[4] Alden *v.* Pryal, 60 Cal. 215.

[5] Reed *v.* Catlin, 49 Wis. 686; Bank of Woodland *v.* Treadwell, 55 Cal. 379; Broadbent *v.* Brumback (Idaho), *supra.*

[6] Patterson *v.* Donner, 48 Cal. 369; Reed *v.* Catlin, *supra.*

[7] Carriere *v.* Minturn, 5 Cal. 435.

sel fees they cannot be recovered. This is wholly a matter of contract;[1] unless provided for by statute, as is the case in some states, as, for instance, New York.[2]

In Pennsylvania stipulations for the payment of attorneys' commissions upon mortgages are valid and not controlled by statute, but they are nevertheless subject to the equitable control of the court, and will be enforced only to the extent of compensating the mortgagee for reasonable and necessary expenses of collection.[3]

A stipulation to pay a reasonable attorney's fee for foreclosure, to be taxed in the judgment, is not usurious and will be enforced.[4] The debtor, by neglecting or refusing to pay, imposes upon the mortgagee the expense of resorting to law to enforce his rights, and it is only just that the expenses of foreclosure should be borne by the party whose own wrong has made it necessary to incur them. A stipulation for the payment of an attorney's fee of $25 on the foreclosure of a mortgage of $11,000 is not unreasonable. It is presumed that such stipulations are made in reference to the costs and expenses otherwise chargeable, and that such fee is an allowance additional to these.[5] A stipulation

[1] Sichel *v.* Carrillo, 42 Cal. 493; Stover *v.* Jonnycake, 9 Kans. 367; Hamlin *v.* Rogers (Ga.), 5 So. Rep. 125. Howell *v.* Pool, 92 N. C. 450; Wylie *v.* Karner, 54 Wis. 591.

In California, when a mortgage provides for an attorney's fee, the court cannot allow more than is stipulated for. Monroe *v.* Fohl, 14 Pac. Rep. 514.

An allowance in excess of the sum stipulated for in the mortgage may be remitted, either before or after judgment, and the error cured. Killips *v.* Stephens (Wis.), 40 N. W. Rep. 652.

[2] Code of Civ. Pro. § 3253; and see Hunt *v.* Chapman, 62 N. Y. 333. See Vockes *v.* Hathorn, 17 Hun (N. Y.), 87; O'Neill *v.* Gray, 39 Hun, 566.

For circumstances under which the stipulated attorneys' fees will not be allowed, see Parks *v.* Allen, 42 Mich. 482; Sales *v.* Sheppard, 99 Ill. 616

[3] Lewis *v.* Germania Sav. Bank, 96 Pa. St. 86; Daly *v.* Maitland, 88 Pa. St. 384. The stipulation for an attorney's fee is in this state regarded as in the nature of a penalty, rather than as liquidated damages, overruling to the contrary Robinson *v.* Loomis, 51 Pa. St. 78.

[4] §§ 635, 1923; Weatherby *v.* Smith, 30 Iowa, 131; Gower *v.* Carter, 3 Iowa, 244; Gilmore *v.* Ferguson, 28 Iowa, 220; Conrad *v.* Gibbon, 29 Iowa, 120; McGill *v.* Griffin, 32 Iowa, 445; Nelson *v.* Everett, 29 Iowa, 184; Mills Co. Nat. Bank *v.* Perry (Iowa), 33 N. W. Rep. 341; Broadbent *v.* Brumback, 16 Pac. Rep. 555; Griswold *v.* Taylor, 8 Minn. 342; Tallman *v.* Truesdell, 3 Wis. 443; Machine Co. *v.* Moreno, 6 Sawy. 35. In Williams *v.* Meeker, 29 Iowa, 292, an attorney's fee of $75 was allowed. National Bank *v.* Danforth (Ga.), 7 S. E. Rep. 546; Merck *v.* Mortgage Co. (Ga.), 7 S. E. Rep. 265.

[5] Hitchcock *v.* Merrick, 15 Wis. 522; Rice *v.* Cribb, 12 Wis. 179; Boyd *v.* Sumner, 10 Wis. 41; Tallman *v.* Truesdell, *supra*. In Remington *v.* Willard, 15 Wis. 583, the mortgage stipulated for a fee of $75, and the court allowed under the Code five per cent. on the amount due, being a very much larger sum. A stipu-

of five per cent. of the amount of the mortgage for counsel fees is additional to the costs recoverable by statute.[1] A provision in the mortgage that the mortgagor shall in case of foreclosure pay the costs, "and fifty dollars as liquidated damages for the foreclosure of the mortgage," was held to be void, because so indefinite that the court could not tell whether the payment was intended to be for something legal or illegal. A judgment rendered under such a stipulation for fifty dollars as attorney's fees was declared erroneous.[2] But a stipulation that the mortgagee shall be entitled "to a judgment for the possession of said premises, and costs, expenses, and attorney's fees of ten per cent. of the amount due for foreclosing said mortgage," is valid; and on a mortgage debt of $4,000 or less, the amount is not so excessive that a court of equity will refuse to enforce it.[3] Under a provision in a power of sale for an attorney's fee in case of foreclosure, no allowance can be made if the mortgage is foreclosed in chancery instead.[4] A stipulation that "an attorney's fee of fifty dollars for foreclosure, with costs of suit and accruing costs," shall be taxed against the mortgagor, does not authorize such a fee in case there be a decree for foreclosure, and the mortgagor pays the debt after suit is commenced, but before a decree of sale is entered.[5]

It is now provided by statute in Kansas that it shall not be lawful for any person or corporation to contract for the payment of attorney's fees in any note, bond, or mortgage; that any stipulation for that purpose is void and cannot be enforced.[6]

A stipulation for an attorney's fee in a mortgage, made while

lation for $100 solicitor's fees, in a mortgage for $10,000, was enforced in Pierce *v.* Kneeland, 16 Wis. 672.

[1] Gronfier *v.* Minturn, 5 Cal. 492; Carriere *v.* Minturn, 5 Cal. 435.

[2] Foote *v.* Sprague, 13 Kans. 155; Kurtz *v.* Sponable, 6 Kans. 395; Tholen *v.* Duffy, 7 Kans. 405; Stover *v.* Jonnycake, 9 Kans. 367.

[3] Sharp *v.* Barker, 11 Kans. 381.

[4] Sage *v.* Riggs, 12 Mich. 313; Van Marter *v.* McMillan, 39 Mich. 304; Hardwick *v.* Bassett, 29 Mich. 17. In this case the court below thought a fee of $75 "a reasonable number of dollars," according to the terms of the mortgage.

[5] Jennings *v.* McKay, 19 Kans. 120; distinguished from Life Asso. *v.* Dale, 17 Kans. 185.

[6] Dassler's Stats. 1876, ch. 68, § 8 *a*; Laws 1876, ch. 77, § 1.

This statute took effect March 1, 1876, and it provides that in all existing mortgages in which no amount is stipulated as attorney's fees, not more than eight per cent. on sums of $250 or under, and no more than five per cent. on all sums over $250, shall be allowed by any court as attorney's fees. Existing mortgages in which a sum has been stipulated as attorney's fees are not affected.

a statute allowing such a fee was in force, is not affected by a repeal of that act.[1]

A mortgagee in whose favor there is a stipulation that he shall be entitled to an attorney's fee in any action that he may bring on the mortgage may claim such fee, when, as a defendant in a foreclosure suit, he sets up his cause of action ; for this is in effect bringing an action on the mortgage.[2] Courts of equity may allow a mortgagee counsel fees incurred in defending his title, without any express contract ;[3] but fees paid to counsel for resisting an application by the assignee in bankruptcy of the mortgagor, to enjoin a sale under a power in the mortgage, do not constitute a payment in defence of the mortgage title.[4]

1607. An irregular attempt at foreclosure, abandoned after a single publication of the notice on account of a defect in this, does not entitle the mortgagee to any attorney's fee provided for in the mortgage upon a foreclosure of it. By declining a tender of the full amount due, because such fee is not paid in addition, he renders himself liable to a statutory penalty for refusing to discharge a mortgage.[5] A mortgagee is not generally entitled to costs of a foreclosure defective through an error of his own in the proceedings, whereby a new foreclosure is rendered necessary.[6]

Where a mortgage provided that "in the event of foreclosure sixty dollars attorney's fee shall be by the court also taxed, and included in the decree of foreclosure," it was held that a tender before decree not including this fee was good, and that this fee could not be collected except by having it taxed in the decree.[7]

[1] White *v.* Rourke, 11 Neb. 519.

[2] Lanoue *v.* McKinnon, 19 Kans. 408.

[3] Lomax *v.* Hide, 2 Vern. 185; Hunt *v.* Fownes, 9 Ves. 70.

[4] Maus *v.* McKellip, 38 Md. 231.

[5] Collar *v.* Harrison, 30 Mich. 66.

[6] Clark *v.* Stilson, 36 Mich. 482.

[7] Schmidt *v.* Potter, 35 Iowa, 426.

CHAPTER XXXVI.

FORECLOSURE SALES UNDER DECREE OF COURT.

I. Mode and terms of sale, 1608–1615.
II. Sale in parcels, 1616–1619.
III. Order of sale, 1620–1632.
IV. Conduct of sale, 1633–1636.
V. Confirmation of sale, 1637–1641.
VI. Enforcement of sale against the purchaser, 1642–1651.
VII. The deed, and passing of title, 1652–1662.
VIII. The delivery of possession to purchaser, 1663–1667.
IX. Setting aside of sale, 1668–1681.

I. *Mode and Terms of Sale.*

1608. A sale under a decree of court is in contemplation of law the act of the court. It is made through the instrumentality of some officer designated by statute or appointed by the court. Whatever name be given to this officer, whether master in chancery, referee, trustee, commissioner, or sheriff,[1] in making the sale he acts as the agent of the court, and must report to it his doings in the execution of its order. This report should set out all the proceedings incident to the sale, the manner and particulars of it, the conveyance to the purchaser, and the payment of the proceeds.[2] When the sale is confirmed it becomes the act of the court, or, in other words, a judicial sale; but, until confirmed, no title passes to the purchaser. In this respect the sale is unlike a sheriff's sale, which is a ministerial act, and the officer, and not the court, is regarded as the vendor; and which, if made conformably to law, is final and valid, and passes the title.[3]

1609. What may be sold. — Mortgages of estates for years, as well as those in fee, may be foreclosed by sale.[4]

[1] Heyer *v.* Deaves, 2 Johns. (N. Y.) Ch. 154; Mayer *v.* Wick, 15 Ohio St. 548. In the federal courts the sale is usually made by the marshal of the district, or by a master specially appointed. Blossom *v.* Railroad Co. 3 Wall. 196, 205. The sheriff or other officer to whom the order is given may sell, though his term of office afterwards expires before the sale. Cord *v.* Hirsch, 17 Wis. 403.

[2] For form of report used in New York, see 5 Wait's Practice, 228.

[3] Rorer's Jud. Sales, §§ 1–68; Harrison *v.* Harrison, 1 Md. Ch. Dec. 331, 335; Williamson *v.* Berry, 8 How. 495, 546; Mebane *v.* Mebane, 80 N. C. 34.

[4] Johnson *v.* Donnell, 15 Ill. 97; Lansing *v.* Albany Ins. Co. Hopk. (N. Y.) 102.

Generally no other or greater interest than that covered by the mortgage can be sold except by consent, or in case of an after-acquired title of the mortgagor.[1] On a bill by a junior mortgagee nothing more than the equity of redemption mortgaged to him can be decreed to be sold, unless the prior mortgagee consents that the decree may be made for the sale of the property and the payment of his mortgage also.[2]

Furthermore, the order of sale cannot embrace other lands not described in the mortgage;[3] though when through mistake the description in a mortgage did not embrace a portion of the land intended to be conveyed, but the purchaser supposed he was buying the whole estate intended to be mortgaged, he was protected in his claim under the sale to the whole.[4]

If two tracts of land are embraced in the mortgage when only one of them was intended to be mortgaged, that may be foreclosed alone without a reformation of the deed, which would be necessary in case of a misdescription of the land.[5]

1610. Subsequent incumbrances. — When a junior mortgagee whose debt is due is a party to a suit to foreclose a prior mortgage, the court may decree a sale of so much of the property as will be sufficient to satisfy both mortgages and all intermediate liens; and the master may be directed to ascertain the amount of such liens previous to the sale. But the junior mortgagee cannot be paid until the master's report is filed and the surplus money brought into court, so that other persons may have an opportunity to present their claims.[6] Ordinarily, however, the amounts of subsequent incumbrances will not be determined until the question arises in its proper course upon application made for the surplus. The mortgagee cannot be compelled to suspend proceedings to allow subsequent parties to contest their rights as between themselves. These must be settled upon a reference to a master of their respective claims to the surplus money.[7]

1611. Questions of priority of right to the proceeds of sale or of equities as to the order of sale cannot be litigated between the defendants before judgment is entered for the plaintiff

[1] See § 1581.

[2] Roll *v.* Smalley, 6 N. J. Eq. (2 Halst.) 64.

[3] Wilkerson *v.* Daniels, 1 Greene (Iowa), 179.

[4] See §§ 97, 1464.

[5] Conklin *v.* Bowman, 11 Ind. 254; Walker *v.* Sellers, Ib. 376; Miller *v.* Kolb, 47 Ind. 220.

[6] Beekman *v.* Gibbs, 8 Paige (N. Y.), 511; Barnes *v.* Stoughton, 10 Hun (N. Y.), 14.

[7] Miller *v.* Case, Clarke (N. Y.), 395.

against whom they set up no equities or defence.[1] But questions as to priority of claims upon different portions of the premises should be settled by the court before a sale is made, rather than after the sale, as the parties interested are then able to act intelligibly as to the bidding at the sale, and the officer selling can directly afterwards proceed to the distribution of the proceeds.[2] If, however, these questions relate merely to the distribution of the surplus and do not affect the order of sale, they are properly settled upon application for the surplus after sale.[3]

1612. The notice of sale. — The time and place of the sale and the terms and conditions of it may be prescribed by the court,[4] though it generally leaves all these details to the master or other officer charged with the conduct of it; but all his acts in relation to it are subject to the direction of the court at all times, and to its sanction when the sale is reported for confirmation. The notice of the sale, when not regulated by statute, may be prescribed by the decree, or left to the officer intrusted with the execution of the decree. It should fix the time of sale, and the hour of the day at which the sale is to be made should be designated; otherwise, if a reasonable price is not obtained for the property, the sale will be set aside.[5]

Where a decree directed notice of a sale to be published in a certain paper, which was after the decree and before the notice merged in another paper and its name changed, and on application to the judge at chambers he directed the sale to be advertised in the paper called by its new name, the publication of the notice in that paper, in accordance with such order, was held valid and

[1] Smart *v.* Bement, 4 Abb. (N. Y.) Dec. 253.

[2] Snyder *v.* Stafford, 11 Paige (N. Y.), 71; Johnson *v.* Badger Mill & Mining Co. 13 Nev. 351.

[3] Schenck *v.* Conover, 13 N. J. Eq. 31; Union Ins. Co. *v.* Van Rensselaer, 4 Paige (N. Y.), 85.

[4] Sessions *v.* Peay, 23 Ark. 39.

[5] Schools *v.* Snell, 19 Ill. 156. The decree directed the master to sell, upon four weeks' notice of the time, terms, and place of sale. The notice stated that the sale would be made on the 2d day of January. "The proof showed that the property was sold at an enormous sacrifice. The notice as to the time of sale was insufficient. The 2d day of January included the astronomical period of a revolution of the earth upon its axis twenty-four hours. 2 Black. Com. 141, and notes. The sale, therefore, might, consistently with the notice, have been made immediately before midnight of that day, and if it was so made it is voidable. The object of a public sale is, by fairness and competition, to evolve the full value of the property exposed, and produce that value in the form of money. This can, as a general rule, only be done by making the sale at a convenient or public place, accessible to bidders, and during the ordinary business hours of the day. The notice should have stated the hour of sale, or that the sale would be made between certain named hours of the business portion of the day."

sufficient.[1] Even a change of place of publication and of the name of the paper does not destroy the identity of the paper, so long as it is the same in substance; and the notice may be published in the paper after such change without any further order of court, and the foreclosure will not be invalidated.[2]

The notice must be given in the manner provided by statute or prescribed by the order of court. The officer making the sale derives his authority from the decree, and he must pursue it substantially or his acts will be set aside.[3]

Generally when a notice is required to be published once in each week for a certain number of weeks, as, for instance, three weeks, it is not necessary that the time between the first and last publications should be three full weeks, but only that one publication should be made on some day of each week.[4]

The notice need not be published in all the editions of the paper issued on the days on which the notice was published.[5]

The notice in its contents should be drawn in fairness both to those who are interested in the property and to those who may purchase it, and should neither contain uncalled for statements calculated to depreciate the price unduly,[6] nor, on the other hand, should it contain statements which might unduly enhance the price or mislead the purchaser.[7]

A personal notice of the sale need not be given to the defendant. The notice of sale prescribed by statute or by the decree is sufficient.[8]

1613. Terms of sale. — The officer making the sale should prepare the terms of sale, a copy of which, with a description of the premises, should be signed by the purchaser, though it is held that sales made under decrees of court are not within the statute of frauds.[9] The auctioneer, moreover, being the agent of both

[1] Sage *v.* Cent. R. R. Co. of Iowa, 99 U. S. 334; *S. C.* 13 West. Jur. 218.

[2] Perkins *v.* Keller, 43 Mich. 53.

[3] Augustine *v.* Doud, 1 Bradw. (Ill.) 588.

[4] Sheldon *v.* Wright, 5 N. Y. 497; Olcott *v.* Robinson, 21 N. Y. 150, reversing 20 Barb. 148; Wood *v.* Morehouse, 45 N. Y. 368, affirming 1 Lans. 405; Chamberlain *v.* Dempsey, 22 How. (N. Y.) Pr. 356; *S. C.* 13 Abb. Pr. 421.

[5] Everson *v.* Johnson, 22 Hun (N. Y.), 115.

[6] Marsh *v.* Ridgway, 18 Abb. (N. Y.) Pr. 262.

It need not state that the property will be sold in parcels when a sale in parcels has been ordered. Hoffman *v.* Burke, 21 Hun (N. Y.), 58.

[7] Veeder *v.* Fonda, 3 Paige (N. Y.), 94.

[8] Sanford *v.* Haines (Mich.), 38 N. W. Rep. 777.

[9] Sugden's Vendors, 148; Attorney General *v.* Day, 1 Ves. Sen. 221; Fulton *v.* Moore, 25 Pa. St. 468; Halleck *v.* Guy, 9 Cal. 181. See § 1866.

parties, his memorandum of the sale is binding upon the purchaser;[1] but his memorandum must have his signature.[2] This contract, however, is not regarded as complete until the officer's report of the sale has been confirmed. The terms of sale, according to the usual practice, provide that a deposit shall be paid down at the time of sale. The amount of this varies according to the circumstances of the case, but is generally about ten per cent. of the purchase money. It is proper to keep the biddings open till the deposit is made, and to resume the sale if the purchaser refuses or neglects to make it.[3] Under special circumstances the sale may be adjourned to another day, and resumed if the deposit is not made in the mean time.[4]

Where a purchaser in good faith left the place of sale without complying with the conditions of sale, under the supposition that he had until the next day to do this, and the referee then and there sold the premises again for a less price, the court ordered a resale upon the first purchaser's giving security to bid the same amount again.[5]

At a sale by a mortgage trustee late in the afternoon of Saturday, the terms of which were announced to be cash, the holder of the mortgage notes bid $10,070, and exhibited his certified check upon a bank for $10,000, and the property was struck off to him, although another person bid $2,938, and tendered the money for his bid. On Monday the highest bidder paid over the money bid, and a confirmation of the sale was asked for. The other bidder contested the confirmation, but the court held that there had been a substantial compliance with the terms of the sale, and confirmed it.[6] Besides, the holder of the mortgage notes may, it seems, comply with the terms of the sale by merely indorsing the amount of the bid on the notes. The formality of paying over the money to the trustee and receiving it back from him is unnecessary.[7]

1614. Deposit required. — The trustee or commissioner appointed to conduct the sale may properly require that the purchaser shall deposit or pay some portion of the price in cash at

[1] McComb *v.* Wright, 4 Johns. (N. Y.) Ch. 659; Hegeman *v.* Johnson, 35 Barb. (N. Y.) 200; National Fire Ins. Co. *v.* Loomis, 11 Paige (N. Y.), 431.

[2] Bicknell *v.* Byrnes, 23 How. (N. Y.) Pr. 486.

[3] Lents *v.* Craig, 13 How. (N. Y.) Pr. 72; *S. C.* 2 Abb. Pr. 294; Sherwood *v.* Reade, 8 Paige (N. Y.), 633.

[4] Hoffman's Referees, 236.

[5] Lents *v.* Craig, *supra.*

[6] Jacobs *v.* Turpin, 83 Ill. 424.

[7] Jacobs *v.* Turpin, *supra.*

the time of sale; and if the sum be not so large as reasonably to deter persons from bidding, this requirement will not prevent a ratification of the sale.[1] But a requirement of the immediate payment in cash of the whole purchase money at the time of sale is an oppressive and unjust act towards the mortgagor, and a court of equity would set the sale aside.[2] If the mortgagee without leave purchases at such a sale, he will be considered merely a mortgagee in possession of a redeemable estate.

It is proper to provide in a decree that in case any other person than the mortgagee becomes purchaser at the sale, he shall be required to pay at once, in cash, a part of the bid as earnest money; and no objection can be taken that the same requirement is not made of the mortgagee.[3]

The trustee is not obliged to accept the highest bidder if he has reason to apprehend that he has not the ability or intention to comply with the terms of sale. The requirement of a deposit is a reasonable precaution in order to insure the completion of the sale, or to cover the costs and expenses of it should it fail by the purchaser's default.[4]

1615. Sale on credit. — Ordinarily, except with the consent of both parties, the sale is for cash. The sheriff has no authority to sell on credit in the absence of any authority given in the deed.[5] But the mortgagee may allow time to the purchaser, and whether this arrangement be made before or after the sale, it does not injure the mortgagor, and is no ground for setting aside the sale, if the credit is only for the amount due to him.[6] But he cannot allow credit beyond this, except with the consent of the other incumbrancers entitled to the proceeds of sale.[7] A court of equity may order the sale to be made on credit without violating the obligation of the mortgage contract;[8] unless the mortgage deed expressly provides that the sale shall be for cash, in which case the requirement is obligatory and cannot be disregarded by the court.[9] If a referee, with the consent of the par-

[1] Maryland Land & Building Soc. *v.* Smith, 41 Md. 516. The deposit required was $300, the property selling for $5,600.

[2] Goldsmith *v.* Osborne, 1 Edw. (N. Y.) 560.

[3] Sage *v.* Cent. R. R. Co. of Iowa, 99 U. S. 334; *S. C.* 13 West. Jur. 218.

[4] Gray *v.* Veirs, 33 Md. 18.

[5] Sauer *v.* Steinbauer, 14 Wis. 70; Sedgwick *v.* Fish, Hopk. (N. Y.), 594.

[6] Mahone *v.* Williams, 39 Ala. 202; Rhodes *v.* Dutcher, 6 Hun (N. Y.), 453.

[7] And see Chaffraix *v.* Packard, 26 La. Ann. 172.

[8] Stoney *v.* Shultz, 1 Hill (S. C.) Ch. 465, 500; Lowndes *v.* Chisholm, 2 McCord (S. C.) Ch. 455.

[9] Crenshaw *v.* Seigfried, 24 Gratt. (Va.) 272. See, to the contrary, Mitchell *v.* McKinny, 6 Heisk. (Tenn.) 83.

ties in interest, sells the premises on time, and the sale is reported and confirmed, it will not be set aside on the motion of a creditor of the deceased mortgagor.[1]

Where, upon a foreclosure sale by order of court, a lien is reserved in the deed to secure the unpaid instalments, the court may, before the final decree of distribution, proceed to a resale of the property by a supplementary proceeding without resorting to an original bill. If innocent purchasers have in the mean time acquired any rights, these must be protected.[2]

When the terms of sale are cash, the purchaser must pay cash, and cannot comply with such terms by a tender of the note of the person entitled to the proceeds of the sale.[3]

II. *Sale in Parcels.*

1616. A sale in parcels may be required by statute or by court.[4] In regulating foreclosure sales in equity, several states have by statute provided that the property shall be sold in parcels when practicable; but that where a sale of the whole will be more beneficial to the parties, the decree shall be made accordingly. But courts of equity, without statutory provisions, apply the same rules; these provisions in fact being only confirmatory of principles by which courts of equity are necessarily governed in suits of foreclosure.[5] When the decree has directed the sale of the whole premises for the payment of an instalment then due, the court may in its discretion afterwards regulate the execution of the decree by directing a sale of a part only, if the premises are divisible, and may, upon the maturity of other instalments, direct further sales.[6] In determining whether the premises shall be sold together or in parcels, the court should direct the sale to be made in such manner as that the parties having equities subject to the mortgage shall not be prejudiced.[7]

[1] Rhodes *v.* Dutcher, 6 Hun (N. Y.), 453.

[2] Stuart *v.* Gay, 8 Sup. Ct. Rep. 1279.

[3] Pursley *v.* Forth, 82 Ill. 327. See Sage *v.* Cent. R. R. Co. of Iowa, 99 U. S. 334; *S. C.* 13 West. Jur. 218.

[4] As to sales in parcels under powers in mortgages and trust deeds, see chapter XI, division 9.

[5] Livingston *v.* Mildrum, 10 N. Y. 440, 443, per Selden, J.; Campbell *v.* Macomb, 4 Johns. (N. Y.) Ch. 534. See, also, Gregory *v.* Purdue, 32 Ind. 453; Magruder *v.* Eggleston, 41 Miss. 248; Am. Life & Fire Ins. & Trust Co. *v.* Ryerson, 6 N. J. Eq. (2 Halst.) 9; Wilmer *v.* Atlanta & Richmond Air Line R. R. Co. 2 Woods, 447; Schreiber *v.* Carey, 48 Wis. 208; Sherwood *v.* Landon, 57 Mich. 219.

[6] Am. Life & Fire Ins. & Trust Co. *v.* Ryerson, *supra.*

[7] De Forest *v.* Farley, 62 N. Y. 628; Livingston *v.* Mildrum, *supra;* Beekman *v.* Gibbs, 8 Paige (N. Y.), 511; Malcolm *v.* Allen, 49 N. Y. 448; Blazey *v.* Delius,

It may sometimes happen that even when the mortgage describes the property in separate parcels, and the amount due on the mortgage may be raised by a sale of a portion of them, it may be necessary for the proper protection of the rights of subsequent incumbrancers that the property should be sold together;[1] and even after a sale of a part, the court, still having jurisdiction of the parties and the subject, may, for the protection of the parties, make a supplementary order for the sale of the remainder.[2]

If an order to sell in parcels be erroneous, a party aggrieved should apply to have the order amended; it is not a defence to the suit which can be taken advantage of by plea, answer, or demurrer.[3]

1617. The wishes of the mortgagor in respect to the mode and order of sale should be followed, if this can be done with safety to the mortgagee, and without injury to other parties in interest. If there be no question that the property is ample to satisfy the debt, whether sold together or in parcels, and there are no subsequent equities to be considered, the mortgagee in such case has no right to direct whether the sale shall be in one way or the other.[4] Under some circumstances, the property being of sufficient value, it seems that a mortgagee would be required to sell the land in such a manner that the mortgagor might have a homestead allotted to him in the residue.[5]

If the mortgagor does not ask to have the property sold in parcels, though he has asked for and had adjournments of the sale, the sale will not be set aside because all the premises are sold as one parcel.[6]

But in a case where the security was doubtful, and the property consisted of one parcel, which, after the making of the mortgage, was laid out in streets and building lots, the mortgagee objected to a sale in parcels, unless security should be given him, because that portion of the land laid out for streets would not be included, and a sale in one parcel was held proper.[7] A mortgagee

74 Ill. 299; Boteler *v.* Brookes, 7 G. & J. (Md.) 143.

[1] Gregory *v.* Campbell, 16 How. (N. Y.) Pr. 417; Johnson *v.* Hambleton, 52 Md. 378.

[2] Livingston *v.* Mildrum, 19 N. Y. 440; De Forest *v.* Farley, 4 Hun (N. Y.), 640.

[3] Horner *v.* Corning, 28 N. J. Eq. 254.

[4] Walworth *v.* Farmers' Loan & Trust Co. 4 Sandf. (N. Y.) Ch. 51; Brown *v.* Frost, Hoffm. (N. Y.) 41; and see King *v.* Platt, 37 N. Y. 155; Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202; and see Wolcott *v.* Schenck, 23 How. (N. Y.) Pr. 385.

[5] Weil *v.* Uzzell, 92 N. C. 515.

[6] Guarantee Trust & Safe Deposit Co. *v.* Jenkins, 40 N. J. Eq. 451.

[7] Griswold *v.* Fowler, 24 Barb. (N. Y.)

who holds a mortgage upon the entire interest in a lot of land cannot be called upon to allow a sale of an undivided interest, — even if the mortgage be made by joint-tenants, who desire a separate sale of undivided interests to enable them more easily to adjust their rights as between themselves.[1]

1618. Whether the property shall be sold entire or in parcels is in some states determined by the court, generally through a reference, and in others is left to the discretion of the officer making the sale.[2] When determined by the court, the order of sale sometimes directs the form and manner of the division, and designates the part first to be sold,[3] or more properly to be offered for sale.[4] Objections to the manner of dividing the land should be called to the attention of the court immediately and before the sale.[5] An order once made will not be disturbed without good cause.[6] When by statute or rule of court the officer determines upon these matters, he must sell in parcels in just the same cases in which the statute or the general principles of equity would make this course obligatory upon the court; and if he makes it otherwise, the court will set it aside.[7] A statutory provision directing the sale of only so much as will pay the amount due with costs, if a division can be made, is peremptory upon the court,[8] leaving only the determination of the question whether

135; Lane *v.* Conger, 10 Hun (N. Y.), 1, and cases cited; and see Ellsworth *v.* Lockwood, 9 Ib. 548; *S. C.* 42 N. Y. 89.

[1] Frost *v.* Bevins, 3 Sandf. (N. Y.) Ch. 188; Schoenewald *v.* Dieden, 8 Bradw. (Ill.) 389.

[2] See statutory regulations of the different states.

[3] Brugh *v.* Darst, 16 Ind. 79; Bard *v.* Steele, 3 How. (N. Y.) Pr. 110.

[4] Cissna *v.* Haines, 18 Ind. 496. This order may be based on the facts shown at the hearing, or upon the consent of the parties, although there be no foundation for it in the pleadings. Cord *v.* Southwell, 15 Wis. 211.

[5] Miller *v.* Kendrick (N. J.), 15 Atl. Rep. 259.

[6] Vaughn *v.* Nims, 36 Mich. 297.

[7] Waldo *v.* Williams, 3 Ill. (2 Scam.) 470; White *v.* Watts, 18 Iowa, 74; Benton *v.* Wood, 17 Ind. 260. See, also, Lay *v.* Gibbons, 14 Iowa, 377. In **Alabama**, when the lands are susceptible of division, and there are infant defendants whose titles will be affected, the court should decree a sale only after ascertaining whether or not the interest of the infants will probably be promoted by a sale in parcels. Walker *v.* Hallett, 1 Ala. 379; Fry *v.* Ins. Co. 15 Ala. 810. But if the defendants are adults, the court may, unless a sale in parcels is asked for, decree a sale without first ascertaining whether the sale will be for the interest of such defendants. Ticknor *v.* Leavens, 2 Ala. 149; Gladden *v.* Mortgage Co. 80 Ala. 270; Homer *v.* Schonfeld, 4 So. Rep. 105. In **Kentucky** the court, before ordering a sale, must be satisfied whether or not the property can be divided without impairing its value. Civ. Code, § 694. The court may satisfy itself in any way as to the divisibility of the property. Sears *v.* Henry, 13 Bush, 413, 415; McFarland *v.* Garnett, 8 S. W. Rep. 17.

[8] Bank of Ogdensburg *v.* Arnold, 5 Paige (N. Y.), 38.

such division can be made without injury to the whole. A sale, however, made without regard to this provision, is only voidable and not void.[1]

Without any statutory requirement a court of equity will order a sale in parcels when the property consists of distinct tracts, together worth much more than the debt secured.[2] The mere fact that the premises are a meagre security and are going to ruin and decay does not justify a sale of the entire premises for a debt only partly due.[3] A decree for such a sale should rest upon an allegation and finding that the premises cannot be divided without manifest injury to all parties concerned.[4]

If the decree of sale describes a quarter section as a single tract, it is not the duty of the master or other officer to divide the land into parcels in making the sale. If the decree describes several distinct parcels, then it is the duty of the officer to sell each parcel separately.[5]

The court having ordered that the property shall be sold either in one lot or in separate parcels, the parties to the suit cannot by agreement disregard the order, and make a valid sale in any other manner.[6] A subsequent party in interest has a right to insist upon a strict compliance with the decree and the statute in the manner of the sale.[7]

The fact that several parcels mortgaged together had previously been held, used, and conveyed together as one farm, is a sufficient reason for selling the whole in one parcel;[8] and, on the other hand, the fact that separate parcels have previously been held and used by themselves, and are evidently capable of being so used to advantage in the future, affords a presumption that they should be sold separately.[9]

Under a mortgage of real property, together with machinery and fixtures thereon, a provision of the mortgage, that in case of foreclosure the personal property shall be sold with the realty, will be followed in the decree.[10] Generally land and buildings used as a mill, with the machinery therein and the water power

[1] 3 Wait's Prac. 376.

[2] Ryerson *v.* Boorman, 7 N. J. Eq. (3 Halst.) 167, 640.

[3] Blazey *v.* Delius, 74 Ill. 299.

[4] Blazey *v.* Delius, *supra.*

[5] Patton *v.* Smith, 113 Ill. 499.

[6] Babcock *v.* Perry, 8 Wis. 277.

[7] Farmers' & Millers' Bank *v.* Luther, 4 Wis. 96.

[8] Anderson *v.* Austin, 34 Barb. (N. Y.) 319; Whitbeck *v.* Rowe, 25 How. (N. Y.) Pr. 403; Johnson *v.* Hambleton, 52 Md. 378; Yale *v.* Stevenson, 58 Mich. 537.

[9] Whitbeck *v.* Rowe, *supra;* Hubbard *v.* Jarrell, 23 Md. 66.

[10] Wood *v.* Whelen, 93 Ill. 153.

connected with the same, constitute a unit, and, under a mortgage covering such property, the whole should be sold together without any special provision therefor, because the parts could not be sold separately without a large depreciation.[1]

1619. Sale on subsequent default. — The statutes of several states provide that when a portion only of the mortgage debt is due a portion of the mortgaged premises may be sold in satisfaction of such part, and that the judgment may stand as security for any subsequent default; and that upon the happening of such default the court shall order a second sale to satisfy such default; and that the same proceeding may be had as often as a default shall happen. The subsequent sale is made by order of court upon the plaintiff's petition, which should state all the essential facts upon which the order is to be founded. Notice of the application must be given to all persons interested who have appeared in the action. The order for sale is issued as in other cases, and the sale is made in the same manner.[2]

If part of the debt be not due, the court should decree a sale of so much of the premises as will be sufficient to pay the amount due, and a further order of sale should be obtained on the maturing of the unpaid instalment of the debt, if the premises can be divided; and before rendering a judgment for a sale the court should determine whether the premises can be sold in parcels without injury.[3] If the premises cannot be divided, the decree should provide for the payment of the money to the mortgagee in extinction of the debt, unless some safe course more beneficial to the mortgagor exists.[4] Generally, a sale of the whole estate, when there is no order for a sale in parcels for an instalment due before the principal amount, exhausts the remedy of the creditor, and passes a clear title to the purchaser.[5]

IV. *Order of Sale.*

1620. When the mortgagor has made successive sales of distinct parcels of the mortgaged land to different persons by warranty deeds, it is generally regarded as only equitable that the

[1] Hill *v.* National Bank, 97 U. S. 450.

[2] Bank *v.* Godfery (Cal.), 20 Pac. Rep. 142.

[3] Griffin *v.* Reis, 68 Ind. 9; Hannah *v.* Dorrell, 73 Ind. 465.

[4] § 1577; Walker *v.* Hallett, 1 Ala. 379; Levert *v.* Redwood, 9 Port. (Ala.) 79; Knapp *v.* Burnham, 11 Paige (N. Y.), 330; Firestone *v.* Klick, 67 Ind. 309.

[5] Poweshiek Co. *v.* Dennison, 36 Iowa, 244, and cases there cited; Escher *v.* Simmons, 54 Iowa, 269; Clayton *v.* Ellis, 50 Iowa, 590; Todd *v.* Davey, 60 Iowa, 532.

mortgagee, when he afterwards proceeds to foreclose his mortgage, should be required to sell in the first place such part, if any, as the mortgagor still retains, and then the parts that have been sold in the same subdivisions, but beginning with the parcel last sold by the mortgagor.[1] This rule rests upon the reason that where the mortgagor sells a part of the mortgaged premises without reference to the incumbrance, it is right between him and the purchaser that the part still held by the mortgagor shall first be applied to the payment of the debt;[2] and this part is regarded as equitably charged with the payment of the debt; therefore, when he afterwards sells another portion of that remaining in his possession, the second purchaser simply steps into the shoes of the mortgagor as regards this land, and takes it charged with the payment of the mortgage debt as between him and the purchaser of the first lot; but still as between the second purchaser and the mortgagor it is equitable that the land still held by the latter should pay the incumbrance. In this manner the equities apply to successive purchasers. This order of equities proceeds upon the supposition that each subsequent purchaser has actual or constructive notice, by the record of the deed or otherwise, of each prior conveyance by the mortgagor of portions of the premises.[3]

This rule is applicable where a part of the residue of land not sold is situated in another state.[4]

1621. Rule of inverse order. — These equitable considerations have led to the adoption of the rule that the mortgagee in such case shall sell the mortgaged land in the inverse order of its

[1] See Contribution to redeem, §§ **1080–1092**; Gantz *v.* Toles, 40 Mich. 725; Meacham *v.* Steele, 93 Ill. 135; Hahn *v.* Behrman, 73 Ind. 120; Foster *v.* Union Bank, 34 N. J. Eq. 48.

[2] Hoy *v.* Bramhall, 19 N. J. Eq. 563; Gaskill *v.* Sine, 13 N. J. Eq. 400; Messervey *v.* Barelli, 2 Hill (S. C.) Ch. 567; Lock *v.* Fulford, 52 Ill. 166; Schrack *v.* Shriner, 100 Pa. St. 45; Mevey's Appeal, 4 Pa. St. 80; Hodgdon *v.* Naglee, 5 Watts & S. (Pa.) 217; Blackledge *v.* Nelson, 2 Dev. (N. C.) Eq. 65; Mahagan *v.* Mead, 63 N. H. 570; Hall *v.* Morgan, 79 Mo. 47; Andreas *v.* Hubbard, 50 Conn. 351; Georgia Pacific R. R. Co. *v.* Walker, 61 Miss. 481; Millsaps *v.* Bond (Miss.), 1 So. Rep. 506.

This equity is recognized even in **Kentucky**, where it is held that there is no equity of one purchaser over another. Blight *v.* Banks, 6 Mon. 192, 197; Dickey *v.* Thompson, 8 B. Mon. 312, 314.

[3] § **743**. For cases giving the reason for the rule, see Weatherby *v.* Slack, 16 N. J. Eq. 491; Wikoff *v.* Davis, 4 N. J. Eq. (3 Green) 224; Ingalls *v.* Morgan, 10 N. Y. 178; Lock *v.* Fulford, *supra;* Matteson *v.* Thomas, 41 Ill. 110; Iglehart *v.* Crane, 42 Ill. 261; Tompkins *v.* Wiltberger, 56 Ill. 385; Stanly *v.* Stocks, 1 Dev. (N. C.) Eq. 313.

[4] Welling *v.* Ryerson, 94 N. Y. 98.

alienation by the mortgagor; and it will be seen by the cases cited that this rule has been generally adopted.[1]

[1] This rule is adopted in, — **United States**: National Savings Bank *v.* Creswell (Supreme Court, 1880), 8 Am. L. Rec. 673. **Alabama**: Mobile, &c. Co. *v.* Huder, 35 Ala. 713. **Colorado**: Fassett *v.* Mulock, 5 Colo. 466. **Connecticut**: Sanford *v.* Hill, 46 Conn. 42, 53, per Pardee, J.; Andreas *v.* Hubbard, 50 Conn. 351. **Florida**: Ritch *v.* Eichelberger, 13 Fla. 169. **Georgia**: Cumming *v.* Cumming, 3 Ga. 460. **Illinois**: Niles *v.* Harmon, 80 Ill. 396; Hosmer *v.* Campbell, 98 Ill. 572; Tompkins *v.* Wiltberger, 56 Ill. 385; Iglehart *v.* Crane, 42 Ill. 261; Sumner *v.* Waugh, 56 Ill. 531; Layman *v.* Willard, 7 Bradw. 183; Alexander *v.* Welch, 10 Ill. App. 181; Dodds *v.* Snyder, 44 Ill. 53; Lock *v.* Fulford, 52 Ill. 166; Matteson *v.* Thomas, 41 Ill. 110; Marshall *v.* Moore, 36 Ill. 321. **Indiana**: Hahn *v.* Behrman, 73 Ind. 120; Alsop *v.* Hutchings, 25 Ind. 347; McCullum *v.* Turpie, 32 Ind. 146; Day *v.* Patterson, 18 Ind. 114; Aiken *v.* Bruen, 21 Ind. 137; Cissna *v.* Haines, 18 Ind. 496; Williams *v.* Perry, 20 Ind. 437; McShirley *v.* Birt, 44 Ind. 382; Houston *v.* Houston, 67 Ind. 276. **Maine**: Shepard *v.* Adams, 32 Me. 63; Holden *v.* Pike, 24 Me. 427. **Massachusetts**: George *v.* Wood, 9 Allen, 80; George *v.* Kent, 7 Allen, 16; Kilborn *v.* Robbins, 8 Allen, 466; Chase *v.* Woodbury, 6 Cush. 143; Allen *v.* Clark, 17 Pick. 47. See Parkman *v.* Welch, 19 Pick. 231; Beard *v.* Fitzgerald, 105 Mass. 134. **Michigan**: Sager *v.* Tupper, 35 Mich. 134; Cooper *v.* Bigly, 13 Mich. 463; Mason *v.* Payne, Walk. 459; McKinney *v.* Miller, 19 Mich. 142; Ireland *v.* Woolman, 15 Mich. 253; Briggs *v.* Kaufman, 2 Brown N. P. 160; Gilbert *v.* Haire, 43 Mich. 283; McVeigh *v.* Sherwood, 47 Mich. 545. **Minnesota**: Johnson *v.* Williams, 4 Minn. 260, 268. **Nebraska**: Lausman *v.* Drahos, 8 Neb. 475. **New Hampshire**: Brown *v.* Simons, 44 N. H. 475; Mahagan *v.* Mead, 63 N. H. 570; Gage *v.* McGregor, 61 N. H. 47. **New Jersey**: Hill *v.* McCarter, 27 N. J. Eq. 41; Mount *v.* Potts, 23 N. J. Eq. 188; Shannon *v.* Marselis, 1 N. J. Eq. (Sax.) 413; Britton *v.* Updike, 3 N. J. Eq. (2 Green) 125; Wikoff *v.* Davis, 4 N. J. Eq. (3 Green) 224; Winters *v.* Henderson, 6 N. J. Eq. (2 Halst.) 31; Gaskill *v.* Sine, 13 N. J. Eq. 400; Weatherby *v.* Slack, 16 N. J. Eq. 491; Keene *v.* Munn, 16 N. J. Eq. 398; Mutual Life Ins. Co. *v.* Boughrum, 24 N. J. Eq. 44; Dawes *v.* Cammus, 32 N. J. Eq. 456; Hiles *v.* Coult, 30 N. J. Eq. 40; Acquackanonk Water Co. *v.* Manhattan L. Ins. Co. 36 N. J. Eq. 586; Powles *v.* Griffith, 37 N. J. Eq. 384. **New York**: Clowes *v.* Dickenson, 5 Johns. Ch. 235, 240; James *v.* Hubbard, 1 Paige, 228, 234; Jenkins *v.* Freyer, 4 Paige, 53; Guion *v.* Knapp, 6 Paige, 35; Patty *v.* Pease, 8 Paige, 277; Skeel *v.* Spraker, 8 Paige, 182; Kellogg *v.* Rand, 11 Paige, 59; Ferguson *v.* Kimball, 3 Barb. Ch. 616; Weaver *v.* Toogood, 1 Barb. 238; Howard Ins. Co. *v.* Halsey, 4 Sandf. 565; Rathbone *v.* Clark, 9 Paige, 648; Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Farmers' Loan & Trust Co. *v.* Maltby, 8 Paige, 361; La Farge Fire Ins. Co. *v.* Bell, 22 Barb. 54; *Ex parte* Merrian, 4 Den. 254; McDonald *v.* Whitney, 9 N. Y. Weekly Dig. 529; Crafts *v.* Aspinwall, 2 N. Y. 289; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271; Kendall *v.* Niebuhr, 58 How. Pr. 156; Hopkins *v.* Wolley, 81 N. Y. 77; Bernhardt *v.* Lymburner, 85 N. Y. 172; Van Slyke *v.* Van Loan, 26 Hun, 344; Thomas *v.* Moravia Machine Co. 43 Hun, 487. **Ohio**: Commercial Bank *v.* W. R. Bank, 11 Ohio, 444; Cary *v.* Folsom, 14 Ohio, 365; Green *v.* Ramage, 18 Ohio, 428; Sternberger *v.* Hanna, 42 Ohio St. 305. **Pennsylvania**: The doctrine of contribution *pro rata* adopted in the earlier decisions in Pennsylvania. Nailer *v.* Stanley, 10 S. & R. 450; Presbyterian Corporation *v.* Wallace, 3 Rawle, 109; Donley *v.* Hays, 17 S. & R. 400, has been overruled in later cases of Cowden's Estate, 1 Pa. St. 267; Carpenter *v.* Koons, 20 Pa. St. 222; Milligan's App. 104 Pa. St. 503. **South Carolina**: Lynch *v.* Hancock, 14 S. C. 66;

For the reason that this rule, whether established by statute or by decisions of state courts, is a rule of property, the courts of the United States sitting in any state in which this rule is established will follow it.[1]

This rule and the question of its adoption has been very frequently before the American courts; and the principle of the rule has also been frequently stated by the English and Irish courts. "If afterwards the mortgagor," says Lord Plunket, "sells a portion of his equity of redemption for valuable or good consideration, the entire residue undisposed of by him is applicable, in the first instance, to the discharge of the mortgage, and in ease of the *bonâ fide* purchaser; and it is contrary to any principle of justice to say that a person afterward purchasing from that mortgagor shall be in a better situation than the mortgagor himself in respect to any of his rights."[2] In the same case when it was previously before the court, Lord Chancellor Hart said that between the mortgagor "and the persons purchasing from him, the contributory fund must be so marshalled as to make his re-

Norton *v.* Lewis, 3 S. C. 25; Stoney *v.* Shultz, 1 Hill, 465; Meng *v.* Houser, 13 Rich. Eq. 210. **Texas**: Miller *v.* Rogers, 49 Tex. 398; Rippetoe *v.* Dwyer, 49 Tex. 498. **Vermont**: Root *v.* Collins, 34 Vt. 173; Lyman *v.* Lyman, 32 Vt. 79. **Virginia**: Henkle *v.* Allstadt, 4 Gratt. 284; Jones *v.* Myrick, 8 Gratt. 179; Conrad *v.* Harrison, 3 Leigh, 532. **West Virginia**: Jones *v.* Phelan, 15 W. Va. 194; Gracey *v.* Myers, 15 W. Va. 194. **Wisconsin**: Worth *v.* Hill, 14 Wis. 559; State *v.* Titus, 17 Wis. 241; Ogden *v.* Glidden, 9 Wis. 46; Aiken *v.* Milwaukee & St. Paul R. R. Co. 37 Wis. 469.

[1] Orvis *v.* Powell, 98 U. S. 176; *S. C.* 8 Cent. L. J. 74.

[2] In Hartley *v.* O'Flaherty, Lloyd & Goold Cases temp. Plunket, 208, 216. See, also, for illustrations of this rule, Hamilton *v.* Royse, 2 Sch. & Lef. 315, 326; Averall *v.* Wade, Lloyd & Goold, temp. Sugden, 252; Harbert's case, 3 Coke, 11.

Mr. Justice Story questioned the correctness of the doctrine, that in case of successive sales of property subject to mortgage, the parcel last sold is liable for the debt in exoneration of that sold next before it; or, in other words, that the parcels are to be charged in the reverse order of the transfers: the parcels last sold being first charged to their full value, and so backwards, until the debt is fully paid. He says: "But there seems great reason to doubt whether this last position is maintainable upon principle; for as between the subsequent purchasers or incumbrancers, each trusting to his own security upon the separate estate mortgaged to him, it is difficult to perceive that either has, in consequence thereof, any superiority of right or equity over the other; on the contrary, there seems strong ground to contend that the original incumbrance or lien ought to be borne ratably between them, according to the relative value of the estates." 2 Story's Eq. Juris. § 1233.

He claimed the authority of the English cases in support of this view. The question was considered in Barnes *v.* Racster, 1 Y. & C. C. C. 401, where the Vice-Chancellor, Sir L. Shadwell, in a case where there were several successive mortgages, instead of throwing the whole burden of the prior incumbrances upon the land conveyed to the last mortgagee, made it a ratable charge on the whole estate.

maining property first applicable; and if that is insufficient, I think the portion of the last purchaser must be applicable before that of any prior purchaser." [1]

The rule applies where the mortgagor has conveyed the premises in different parcels, and the grantees of these parcels again convey them in parcels, the grantees of the latter parcels being liable under this rule for the share of the mortgage chargeable upon their grantor's share of the premises, in the inverse order of conveyance to them.[2] It applies where a grantee subject to incumbrances reconveys a part of the premises to his grantor without mentioning the incumbrances.[3]

The rule is one of equity, and will not be applied in any case where its application would work injustice; [4] it is not applied where the mortgage does not rest alike upon the whole of the land,[5] nor does it apply to a sale of the equity of redemption upon execution for a debt other than that secured by the mortgage.[6]

1622. This rule is generally held to apply to subsequent mortgages of the equity of redemption as well as to absolute conveyances of it.[7] In New Jersey, however, it is held that as between the holders of mortgages of different and distinct parts of the incumbered land, each is bound to bear his proportion according to the value of the parts; and that the rule does not apply as between them.[8] The entire premises may be decreed to be sold, and the proceeds applied to the payment of the mortgages and other incumbrances, according to their priority, although sufficient to satisfy the first mortgage be obtained by a sale of part of the premises.[9]

When, however, a portion of the mortgaged premises has been mortgaged again, and subsequently the balance has been conveyed absolutely, inasmuch as the mortgage is only a qualified alienation, and the mortgagor still has an interest in the property, that part is first sold; and if there is any surplus beyond the amount required to satisfy the second mortgage, that is, if

[1] Beatty, 61, 79.

[2] Hiles *v.* Coult, 30 N. J. Eq. 40; *S. C.* 18 Am. L. Reg. (N. Y.) 203.

[3] Hopkins *v.* Wolley, 81 N. Y. 77.

[4] Hill *v.* McCarter, 27 N. J. Eq. 41; Bernhardt *v.* Lymburner, 85 N. Y. 172.

[5] Evansville Gas Light Co. *v.* State, 73 Ind. 219.

[6] Erlinger *v.* Boul, 7 Bradw. (Ill.) 40.

[7] Dodds *v.* Snyder, 44 Ill. 53; Steere *v.* Childs, 15 Hun (N. Y.), 511; Milligan's App. 104 Pa. St. 503; Thomas *v.* Moravia Machine Co. 43 Hun (N. Y.), 487; Bernhardt *v.* Lymburner, *supra.*

[8] Pancoast *v.* Duval, 26 N. J. Eq. 445.

[9] Ely *v.* Perrine, 2 N. J. Eq. (1 Green) 396; Vogel *v.* Brown (Ill.), 11 N. E. Rep. 327.

the equity of redemption is of any value, that is applied in payment of the first mortgage before resorting to the portion of the premises conveyed absolutely.[1] But after this if the property is not of sufficient value to pay both mortgages, as between the second mortgagee and the subsequent purchaser, it would seem that in the distribution of proceeds the former should be entitled to any surplus remaining after the payment of the first mortgage.

If the mortgagor alienates a portion of the mortgaged premises and afterwards mortgages another portion, the second mortgagee cannot claim that the part alienated before the giving of his mortgage shall be first sold; but the rule of inverse order of alienation will apply against him.[2]

1623. When portions of the property have been sold under judgment, those portions stand in the order of sale in a foreclosure suit as of the times when the judgments respectively become liens, and not as of the times when the conveyances under such sales were executed by the sheriff.[3] In Pennsylvania, however, it is held that the rule does not apply at all to sales under judgments; the purchaser at such sales having no claim upon the mortgagor, or any one else, to pay off the mortgage for their relief.[4]

1624. The record of a subsequent deed is not, however, notice to the prior mortgagee. He is not required to search the records from time to time to see whether other incumbrances have been put upon it.[5] A distinct and actual notice is necessary

[1] Kellogg *v.* Rand, 11 Paige (N. Y.), 59.

[2] Sager *v.* Tupper, 35 Mich. 134.

[3] Woods *v.* Spalding, 45 Barb. (N. Y.) 602.

[4] Carpenter *v.* Koons, 20 Pa. St. 222.

[5] § 723; Greswold *v.* Marshan, 2 Ch. Cas. 170; Cheesebrough *v.* Millard, 1 Johns. (N. Y.) Ch. 409; Stuyvesant *v.* Hone, 1 Sandf. (N. Y.) Ch. 419; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271; Kendall *v.* Niebuhr, 58 How. (N. Y.) Pr. 156; Shannon *v.* Marselis, 1 N. J. Eq. (Sax.) 413; Birnie *v* Main, 29 Ark. 591; James *v.* Brown, 11 Mich. 25; Carter *v.* Neal, 24 Ga. 346; Taylor *v.* Maris, 5 Rawle (Pa.), 51; Ritch *v.* Eichelberger, 13 Fla. 169; Brown *v.* Simons, 44 N. H. 475; Johnson *v.* Bell, 58 N. H. 395; Gage *v.* McGregor, 61 N. H. 47; Lyman *v.* Lyman, 32 Vt. 79; Chase *v.* Woodbury, 6 Cush. 143; Hosmer *v.* Campell, 98 Ill. 572.

In James *v.* Brown, *supra,* the court say: "It is the duty of a subsequent mortgagee, if he intends to claim any rights through the first mortgage, or that may affect the rights of the mortgagee under it, to give the holder thereof notice of his mortgage, that the first mortgagee may act with his own understandingly. If he does not, and the first mortgagee does with his mortgage what it was lawful for him to do before the second mortgage was given, without knowledge of its existence, the injury is the result of the second mortgagee's negligence in not giving notice."

to affect the rights of the mortgagee in this respect, and oblige him to foreclose with reference to the subsequent order of alienation. The record is not even constructive notice to him. Only subsequent purchasers and incumbrancers are within the purview of the registry laws. A person interested in the equity wishing to protect himself must bring home to the mortgagee actual notice of his equities.[1] If he is not a party to the foreclosure suit, and has no opportunity to present his claims there, he may file a bill against the mortgagee and the other subsequent purchasers, and obtain a stay of the sale until the respective equities can be adjusted. After a sale it is too late to assert his rights.[2]

In like manner when there has been a partition of land, of which an undivided half was mortgaged, that part of the land set off to the mortgagor should be first sold; and if the officer, having been offered the whole amount of the debt for that part, proceeds to sell an undivided half of the whole, the sale will be set aside.[3] And so if a portion of the mortgaged land has been sold to pay the mortgagor's debts after his decease, the residue of the premises remaining in his heirs must be first resorted to for the satisfaction of the mortgage.[4]

1625. But this rule does not apply in cases where the parties have by agreement in their deed charged the mortgage upon the land in a different manner; as where by the terms of sale of a part of the premises the mortgage is made a common charge upon the whole premises, or the part conveyed is subjected to a proportionate part of the incumbrance;[5] or it is provided that a

[1] Matteson *v.* Thomas, 41 Ill. 110; Lausman *v.* Drahos, 8 Neb. 457; Hoy *v.* Bramhall, 19 N. J. Eq. 563; Blair *v.* Ward, 10 N. J. Eq. (2 Stockt.) 119; King *v.* McVickar, 3 Sandf. (N. Y.) Ch. 192; Cheesebrough *v.* Millard, 1 Johns. (N. Y.) Ch. 409, 414; Gouverneur *v.* Lynch, 2 Paige (N. Y.), 300.

[2] Lausman *v.* Drahos, *supra.*

[3] Quaw *v.* Lameraux, 36 Wis. 626.

[4] Moore *v.* Chandler, 59 Ill. 466.

[5] Mutual Life Ins. Co. *v.* Boughrum, 24 N. J. Eq. 44; Pancoast *v.* Duval, 26 N. J. Eq. 445; Hoy *v.* Bramhall, *supra.* In this case the conveyance was made, "subject, however, to the payment by said grantee of all existing liens upon said premises." The effect of this was to subject the lands conveyed to the payment of a proportionate part of the mortgage. The court say: It may be that the language is not sufficient to create a covenant on which a strictly personal liability may be based; but it clearly makes the part conveyed subject to its proper proportion of the incumbrances, so as to relieve, to that extent, that part retained by the mortgagor, and that therefore both parts must contribute according to their relative values. To same effect see Briscoe *v.* Power, 47 Ill. 447; Halsey *v* Reed, 9 Paige (N. Y.), 446; Torrey *v.* Bank of Orleans, Ib. 649; Warren *v.* Boynton, 2 Barb. (N. Y.) 13; Coles *v.* Appleby, 22 Hun (N. Y.), 72; Zabriskie *v.* Salter, 80 N. Y. 555.

certain parcel of the mortgaged premises shall first be charged with the payment of the mortgage debt.[1] In such cases, if there be no specific agreement as to the proportion which each part is to bear, contribution must be made according to the relative value of each part.

When a purchaser of a part of the premises has agreed to assume the whole or a part of the mortgage debt as a part of the consideration he pays for the land, and subsequently sells it to another, this grantee having notice of such agreement stands in no better position than the first purchaser as regards any equity against the mortgagor.[2] And so where the whole of a tract of land was subject to a mortgage and a portion of it was conveyed, and afterwards the remainder was conveyed to the same purchaser subject to the payment of the mortgage, and the purchaser subsequently made mortgages of the different parcels, upon a foreclosure of the first named mortgage the assumption of this mortgage in the deed of the second parcel was regarded as operating between the parties as an agreement that the land therein named should be the primary fund for the payment of the debt, and that the mortgage should be enforced upon that land in the first instance, and upon the lot first conveyed in the case of a deficiency; and therefore it was held that the order of sale was not determined by the order of alienation by the purchaser.[3]

But the assumption of the mortgage as it appears in a deed of a part of the mortgaged premises is not always conclusive as to a purchaser of another part as regards the equities of the parties. The grantor may, by a subsequent agreement with a purchaser of a part of the premises who has assumed the whole mortgage, release such purchaser wholly or in part from his obligation to pay the mortgage; and a subsequent grantee of another part of the premises will succeed only to the equities of his grantor as they exist at the time of the conveyance to him, whether he has notice of such equities or not. Thus, the owner of a tract of land having conveyed a portion of it supposed to contain eight acres, with a covenant that in case of a deficiency he would make compensation therefor at a certain price, the grantee assuming and

[1] Mickle *v.* Maxfield, 42 Mich. 304.

[2] Engle *v.* Haines, 5 N. J. Eq. (1 Halst.) 86; Ross *v.* Haines, Ib. 632; Crenshaw . Thackston, 14 S. C. 437.

[3] Steere *v.* Childs, 15 Hun (N. Y.), 511.

agreeing to pay the mortgage upon the whole tract, subsequently, upon ascertaining that there was a deficiency in quantity of the land conveyed, agreed to save the grantee harmless from a part of the mortgage debt amounting to the value of the deficient land. The grantor, after making that agreement, conveyed the residue of the land to another person by a deed covenanting that such land was free of all incumbrances. In an action to foreclose the mortgage it was held that the grantee of such residue succeeded only to the equities of the grantor existing at the time of the conveyance; that the residue of the land was chargeable with the portion of the mortgage against which the grantor had agreed to protect the purchaser of the portion of the land first conveyed; that the fact that the covenant of such purchaser to pay the whole mortgage was contained in a deed on record was immaterial; and that it was also immaterial that the agreement of the grantor to reassume the amount of the rebate for the deficiency in the quantity of land was not of record, and that the grantee of the residue had no notice of it.[1]

1626. Contribution according to value. — The rule that the sale shall take place in the inverse order of alienation is rejected in the states of Iowa[2] and Kentucky.[3] Instead of this they have adopted the rule that the several owners shall contribute according to the value of their portions of the property. If the purchasers have made improvements upon their lots, the enhanced value resulting from the improvements is not included in the valuation of the property under this rule. In these states, therefore, the mortgaged lands may be sold under the decree of foreclosure, without reference to the mortgagee's knowledge that they have been sold in parcels at different times to different persons.

1627. Valuation to be made as of what time. — When contribution is to be made under the rule adopted by these states, that the proportion is to be determined by the relative value of

[1] Judson *v.* Dada, 79 N. Y. 373.

[2] Bates *v.* Ruddick, 2 Iowa, 423; Massie *v.* Wilson, 16 Iowa, 390; Barney *v.* Myers, 28 Iowa, 472; Huff *v.* Farwell, 67 Iowa, 298.

[3] Poston *v.* Eubank, 3 J. J. Marsh, 43; Campbell *v.* Johnston, 4 Dana, 177, 182; Dickey *v.* Thompson, 8 B. Mon. 312. In the latter case this rule is discussed at length, and the earlier decisions approved and affirmed, though contrary to the later decisions in other states. It was considered more equitable that the burden should be equalized according to the value of the different parcels, than that the whole should be thrown upon the last purchaser of the last lot. See, also, Hunt *v.* McConnell, 1 T. B. Mon. (Ky.) 219.

As to **North Carolina**, see Stanly *v.* Stocks, 1 Dev. Eq. 318, where the question was raised.

the different parcels, whether the valuation should be taken at the date of the mortgage, at the time of foreclosure, or at the date of the several purchases, is not perhaps very material, as the fluctuation of price would generally be about equal for the different parcels.[1] The practice in different courts has not been uniform. Nor, indeed, has the practice of the same court always been the same in this regard.

When the mortgaged premises have been conveyed in distinct parcels, and the subsequent grantees or mortgagees of the parts are bound to contribute in proportion to the value of their parts, they are entitled to have the premises sold in parcels, provided it can be done without prejudice to the rights of the mortgagee.[2]

1628. As a general rule if a mortgagee has other security for his demand, and another creditor has a lien upon one of the funds only, the former must resort in the first place to that security upon which no one other than his debtor has any claim;[3] and he must exercise good faith and reasonable diligence in the enforcement of his rights.[4] This rule is subject to the qualification that it shall not be applied where it would work any injustice to the prior creditor,[5] or to any other person interested in the securities, as, for instance, an intervening lien-holder, having a superior equity;[6] or where the mortgagee's right to satisfy his claim out of both funds would be in any way impaired; or where there

[1] Valuation at the date of the mortgage was adopted in Stevens *v.* Cooper, 1 Johns. (N. Y.) Ch. 425; Hill *v.* Howell, 36 N. J. Eq. 25; Johnson *v.* Williams, 4 Minn. 260; Parkman *v.* Welch, 19 Pick. Mass. 231; Morrison *v.* Beckwith, 4 Mon. (Ky.) 72, 76; but in Burk *v.* Chrisman, 3 B. Mon. (Ky.) 50, the same court sustained a valuation at the date of the several purchases; and in Dickey *v.* Thompson, 8 B. Mon. (Ky.) 312, seemed to approve of a valuation at the time of foreclosure.

[2] Pancoast *v.* Duval, 26 N. J. Eq. 445; Stelle *v.* Andrews, 19 N. J. Eq. 409.

[3] § 728; Story's Eq. Juris. §§ 559, 560. This principle is illustrated by Lord Hardwicke in Lanoy *v.* Athol, 2 Atk. 444, 446: "Suppose a person who has two real estates mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first; the court in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee." See, also, Wright *v.* Nutt, 1 H. Bl. 136, 150; McLean *v.* Lafayette Bank, 4 McLean, 430; Swift *v.* Conboy, 12 Iowa, 444; Ramsey's Appeal, 2 Watts, 228; Fowler *v.* Barksdale, Harper's (S. C.) Eq. 164; Terry *v.* Rosell, 32 Ark. 478; Warwick *v.* Ely, 29 N. J. Eq. 82; Dawes *v.* Cammus, 32 N. J. Eq. 456; Bishop Bailey B. & L. Asso. *v.* Kennedy (N. J.), 12 Atl. Rep. 141; Scott *v.* Webster, 44 Wis. 185; *S. C.* 6 Reporter, 287; Bryant *v.* Stephens, 58 Ala. 636.

[4] Shields *v.* Kimbrough, 64 Ala. 504.

[5] Slater *v.* Breese, 36 Mich. 77.

[6] Leib *v.* Stribling, 51 Md. 285.

is any doubt of the sufficiency of the fund upon which the junior creditor has no claim; or where the prior creditor is not willing to run the risk of obtaining satisfaction out of that fund; or where that fund is of a dubious character, or is one which may involve him in litigation to realize. "But it is the ordinary case," says Lord Eldon, "to say, a person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him who has two funds upon that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him."[1]

In accordance with these restrictions of the rule, where a creditor was secured by a mortgage of land and slaves, and the land was afterwards sold by the mortgagor, and one of the slaves was sold by the sheriff under executions issued part before and part after the mortgage, though the sum received by the sheriff was sufficient to satisfy the senior executions, and the balance of the mortgage debt, the mortgagee was not compelled to resort to this fund because he might thereby incur the expense and risk of litigation; but was allowed to foreclose the mortgage upon the land to satisfy his demand.[2] The mortgagee might lose the very benefit sought by having a double security, if he were compelled to incur the risk of delay or loss by being referred for his payment to security he deemed the more uncertain. The subsequent purchaser of the mortgaged property takes it with full knowledge of the incumbrance, and it is more equitable that he should be obliged to pay the mortgage debt and be subrogated to the other security of the mortgagee than that the latter should be prejudiced.

A prior mortgagee cannot be held responsible by a subsequent mortgagee for the value of any part of the mortgaged property which has been lost, destroyed, or removed by the mortgagor, without fraud or gross negligence on his part.[3]

1629. So also when two persons have mortgages upon the same piece of property, which is insufficient to satisfy both, and one of them has a lien for his debt upon other property, equity requires that he shall exhaust the latter before resorting to the mortgaged property.[4] In like manner when two persons, to se-

[1] Aldrich *v.* Cooper, 8 Ves. 382, 395; and see Averall *v.* Wade, Lloyd & Goold temp. Sugden, 252, and notes.

[2] Walker *v.* Covar, 2 S. C. 16.

[3] Shields *v.* Kimbrough, 64 Ala. 504.

[4] Russell *v.* Howard, 2 McLean, 489; Andreas *v.* Hubbard, 50 Conn. 351; Trowbridge *v.* Harleston, Walker (Mich.), 185;

cure the debt of one of them, have jointly mortgaged three parcels of land, one of which they own jointly, while each of them owns one of the others individually, the decree should order the sale, first, of the portion of the mortgagor equitably bound to pay the debt, and next of the joint parcel.[1]

And where a principal debtor and his surety have both mortgaged their lands to secure a debt, the lands of the principal debtor are to be first sold, and those of the surety only for the deficiency.[2]

Where one of two tenants in common has paid his share of a joint mortgage, and the other has mortgaged his portion again, the former is entitled to a discharge under a statute authorizing joint debtors to make separate settlements with their creditors; and the second mortgagee cannot have the first mortgage satisfied from the joint property, or postponed to his own, on the ground that the release is in fraud of his rights.[3]

1630. If one holds two mortgages on different parcels of land to secure the same debt, in the absence of any equities in subsequent purchasers he may foreclose either one without the other; but if there are subsequent purchasers, the equitable rules already spoken of must be observed;[4] and if the mortgages cover in part the same land, and are both foreclosed together, the land included in the first mortgage should be exhausted before recourse is had to the second.[5]

When a principal and a surety have jointly mortgaged lands belonging to each individually, the surety has an equity to require that the lands of the principal shall be first sold and applied to the satisfaction of the debt.[6] The same rule applies in case of a mortgage by tenants in common to secure the debt of one of them.[7]

1631. If the mortgagee, having notice of successive alienations of parts of the mortgaged premises, has released a part which is previously liable for the payment of the debt, he cannot charge the other portions of the premises with the payment of it

Sibley *v.* Baker, 23 Mich. 312; Sternberg *v.* Valentine, 6 Mo. App. 176; Warner *v.* De Witt Co. Nat. Bank, 4 Bradw. (Ill.) 305; Millsaps *v.* Bond, 64 Miss. 453; Turner *v.* Flinn, 67 Ala. 529.

[1] Ogden *v.* Glidden, 9 Wis. 46.

[2] Drake *v.* Bray, 2 Stewart's Dig. 1877, p. 1036; Gresham *v.* Ware, 79 Ala. 192.

[3] Southworth *v.* Parker, 41 Mich. 198.

[4] Burpee *v.* Parker, 24 Vt. 567.

[5] Raun *v.* Reynolds, 11 Cal. 14.

[6] Gresham *v.* Ware, *supra*.

[7] Lorey *v.* Overton, 42 N. J. Eq. 330; 11 Atl. Rep. 15.

without first deducting the value of the part released,[1] and he must make this deduction before proceeding to sell the other portions.[2] If that value equals the entire debt, he must bear the loss, as he cannot then resort to the lot first sold; if it is equal to a part of the debt only, he may resort to the lot sold for the deficiency. But if the mortgagor had no title to the lot released, or it could in any way be shown that the owners of the other lots were not prejudiced by the release, this rule would not apply.[3] In such cases, in order to ascertain the value of the different parts of the land and the amount due on the mortgage, a reference is ordered.[4] A mortgagee, however, does not, by a partial release without consideration, impair his right to enforce his mortgage against the remainder of the property, unless he had actual notice of the previous transfer of the remainder or of some portion of it by the mortgagor. The same rule about notice already stated applies equally here. A reference in his release to a conveyance of another part of the land by the mortgagor is, however, constructive notice of it.[5]

If the mortgagee having also personal security for his demand by his fault and negligence loses this, a purchaser of the land may compel him to deduct from the mortgage debt the value of the security lost, so that the mortgage can be foreclosed only for the balance.[6]

But where by the terms of the mortgage the mortgagee has

[1] See §§ 727, 731. **New Jersey**: Reilly *v.* Mayer, 12 N. J. Eq. 55; Vanorden *v.* Johnson, 14 N. J. Eq. 376; Mickle *v.* Rambo, 1 N. J. Eq. (Sax.) 501; Shannon *v.* Marselis, Ib. 413; Harrison *v.* Guerin, 27 N. J. Eq. 219; Mount *v.* Potts, 23 N. J. Eq. 188; Hoy *v.* Bramhall, 19 N. J. Eq. 563; Blair *v.* Ward, 10 N. J. Eq. (2 Stockt.) 119; Gaskill *v.* Sine, 13 N. J. Eq. 400. **New York**: Guion *v.* Knapp, 6 Paige, 35; Stevens *v.* Cooper, 1 Johns. Ch. 425; Stuyvesant *v.* Hone, 1 Sandf. Ch. 419; Patty *v.* Pease, 8 Paige, 277. **Massachusetts**: Parkman *v.* Welch, 19 Pick. 231; George *v.* Wood, 9 Allen, 80; Beard *v.* Fitzgerald, 105 Mass. 134; Clark *v.* Fontain, 135 Mass. 464. **Other States**: Denster *v.* McCamus, 14 Wis. 307; Birnie *v.* Main, 29 Ark. 591; Taylor *v.* Maris, 5 Rawle (Pa.), 51; James *v.* Brown, 11 Mich. 25; Miller *v.* Rogers, 49 Tex. 398.

In Iglehart *v.* Crane, 42 Ill. 261, the court say: "From this rule, as to the order in which mortgaged premises are to be charged, it follows as a corollary, that, if the mortgagee with actual notice of the facts releases from the mortgage that portion of the premises primarily liable, he thereby releases *pro tanto* the portion secondarily liable. When the mortgage is sought to be enforced against the owner of the latter, he can claim an abatement of his liability to the extent of the value of that portion which should have made the primary fund."

[2] Hall *v.* Edwards, 43 Mich. 473; Hill *v.* Howell, 36 N. J. Eq. 25; Schrack *v.* Shriner, 100 Pa. St. 451.

[3] Taylor *v.* Short, 27 Iowa, 361.

[4] Gaskill *v.* Sine, *supra.*

[5] Booth *v.* Swezey, 8 N. Y. 276.

[6] Moody *v.* Haselden, 1 S. C. 129.

agreed to release any portion of the mortgaged land upon receiving a certain price per foot, and the mortgagor divides the land into lots and sells two of them by warranty deed to different purchasers, who build dwelling-houses upon the lots, and one purchaser obtains a release of his lot upon paying to the mortgagee the stipulated price per foot for the land, the other purchaser cannot restrain the mortgagee from selling his lot under the mortgage, the lots remaining unsold not being worth enough to pay the mortgage debt; but such purchaser is entitled to redeem on paying the stipulated price per foot.[1]

1632. Homestead. — The fact that the mortgage covers a homestead and also other property, which is subject to a subsequent judgment lien, gives the debtor no right to have the latter property first applied to the payment of the mortgage debt, so that he may save his homestead.[2] The fact that part of the property is a homestead does not change the equity rule that a party having security on two funds shall first exhaust his remedy upon the fund he alone is secured upon, when there is another party having security on the other.[3] In a case where the mortgage embraced the homestead and a business lot, and the homestead had been sold to satisfy the mortgage debt and there were judgment liens upon the business lot, the court declined to set aside the foreclosure sale.[4]

[1] Clark *v.* Fontain, 135 Mass. 464.

[2] §§ **731, 1286,** where the reasons for the rule are stated; White *v.* Polleys, 20 Wis. 503; Searle *v.* Chapman, 121 Mass. 19; Chapman *v.* Lester, 12 Kans. 592. *Contra,* in **California**: McLaughlin *v.* Hart, 46 Cal. 638; and in **Iowa**: Equitable Life Ins. Co. *v.* Gleason, 62 Iowa. 277. In this state a distinction is taken between a subsequent sale of the mortgaged land and a subsequent mortgage of it as regards the effect upon the homestead right. Thus in Dilger *v.* Palmer, 60 Iowa, 117, it was held, upon a subsequent sale with covenants of warranty of the portion of the mortgaged premises not embraced in the homestead, the mortgagor could not insist that the property so conveyed should be first sold to satisfy the mortgage. The homestead, on the contrary, must first be sold. This distinction is placed on the ground that the conveyance in this case is the voluntary act of the mortgagor, while in the other case the conveyance is the legal result of the mortgage. See Dodds *v.* Snyder, 44 Ill. 53.

In **South Carolina** it is held that the extent of the homestead should be judicially ascertained before judgment of foreclosure is passed. Adger *v.* Bostick, 12 S. C. 64. There the judgment creditor has the equitable right to compel the mortgagor to first exhaust so much of the debtor's land as embraces the homestead. State Sav. Bank *v.* Harbin, 18 S. C. 425.

[3] *In re* Sauthoff & Olson, 7 Biss. 167; Hall *v.* Morgan, 61 Miss. 47.

[4] Jones *v.* Dow, 18 Wis 241, Chief Justice Dixon saying: "However just and reasonable it might be for the court to compel a sale of the business lot first, and thus save the homestead, if that were the only question, yet we think the mortgagor's equity to hold his homestead fully

A foreclosure sale under a mortgage embracing a homestead estate will not be set aside because the land was first offered in separate parcels corresponding with the government subdivisions, and no bids were received, when the whole of the land including the homestead was offered and sold.[1]

If a mortgage be executed by a husband alone, so that it has no validity as against the homestead estate, and this be set apart and the remainder of the land sold under foreclosure proceedings, the mortgagee's lien is exhausted.[2]

Where a first mortgage was made by a husband and wife with a release of their homestead right, and a second mortgage of the same premises was made without such a release, the wife not joining, and the homestead was declared as having been selected upon a certain part of the land, upon a foreclosure of the first mortgage it was held that the second mortgagee could not insist that the homestead should be first sold.[3]

The mortgagee should be made a party to the proceedings for setting off the homestead, or he will not be estopped from denying the right upon foreclosure.[4]

IV. *Conduct of Sale.*

1633. The officer conducting the sale should be present. The sale is made by public auction to the highest bidder, unless otherwise ordered by the court. It is conducted by the officer designated by the decree or by statute,[5] though he may employ an auctioneer to act for him in his presence.[6] His presence is required in order that the parties interested may have the benefit of the discretion and judgment which he should exercise for their benefit, in order to obtain a fair price for the property. There is often special occasion for the exercise of a reasonable discretion in the matter of adjournments; for unexpected occurrences may at the last moment threaten a sacrifice of the property, unless he

countervailed by the equities of his creditors, who must look to the business lot for their satisfaction, and who have no lien upon the homestead. Until the legislature shall have declared the obligation to preserve the homestead superior to that of paying one's honest debts, we must hold the equity of the creditor at least equal to that of the debtor in cases like this." See, also, Schreiber *v.* Carey, 48 Wis. 208.

[1] Brumbaugh *v.* Shoemaker, 51 Iowa, 148.

[2] Lear *v.* Tatten, 14 Bush (Ky.), 101.

[3] Armitage *v.* Davenport (Mich.), 31 N. W. Rep. 408.

[4] Goodall *v.* Boardman, 53 Vt. 92.

[5] Heyer *v.* Deaves, 2 Johns. (N. Y.) Ch. 154.

[6] Blossom *v.* R. R. Co. 3 Wall. 196, 205

exercises his right to adjourn the sale to another day. This is one of the duties which he cannot properly delegate to another. If a sale be made in the absence of the sheriff, whose duty it is to conduct it, by his agent or bailiff informally appointed, and the sheriff executes a deed to the purchaser, the deed will pass the title, and will be good in a collateral proceeding as the act of an officer *de facto*, but will be set aside on a direct application made in the course of the same proceeding.[1] It has even been held that a sale by one loan commissioner in the absence of his associate is irregular, though the deed be executed by both.[2]

The property must be offered to the highest bidder, and bids received so long as they are offered; and after waiting a reasonable time for another, and none being made, it should be struck off to the highest bidder.[3]

1634. Adjournment.[4] — If at the time and place of sale there be no bidder present other than the mortgagee or his attorney, it is the duty of the auctioneer or officer making the sale to adjourn it.[5] The application for an adjournment usually comes from some one or more of the parties interested; but it may be the duty of the officer to adjourn the sale without the request of any one, and even against the wish of a party in interest.[6] The officer making the sale may properly adjourn it by direction of the complainant's solicitor, for the purpose of enabling the mortgagors to pay the debt; and he may make several short adjournments for this purpose, and finally, upon payment, may discontinue the sale altogether.[7] He has a discretionary power in this respect; but if he exercises it in an arbitrary or unreasonable manner, the sale will be set aside and a resale ordered.[8] The adjourned day of sale should be announced at the time of the adjournment,[9] but if this cannot be done on account of an injunction, a general

[1] Meyer *v.* Patterson, 28 N. J. Eq. 249; S. C. *sub. nom.* Meyer *v.* Bishop, 27 Ib. 41.

[2] York *v.* Allen, 30 N. Y. 104; Olmsted . Elder, 5 N. Y. 144; Pell *v.* Ulmar, 21 Barb. (N. Y.) 500. See, however, King *v.* Stow, 6 Johns. (N. Y.) Ch. 323.

[3] Bicknell *v.* Byrnes, 23 How. (N. Y.) Pr. 486; and see May *v.* May, 11 Paige (N. Y.), 201.

[4] See chapter XL, division 10.

[5] Strong *v.* Catton, 1 Wis. 471.

[6] Astor *v.* Romayne, 1 Johns. (N. Y.) Ch. 310; McGown *v.* Sandford, 9 Paige (N. Y.), 290. See, also, Russell *v.* Richards, 11 Me. 371; Tinkom *v.* Purdy, 5 Johns. (N. Y.) 345; Richards *v.* Holmes, 18 How. 143, 147; Ward *v.* James, 8 Hun (N. Y.), 526.

[7] Blossom *v.* R. R. Co. 3 Wall. 196.

[8] Breese *v.* Busby, 13 How. (N. Y.) Pr. 485.

[9] La Farge *v.* Van Wagenen, 14 How. (N. Y.) Pr. 54.

adjournment may be made, and the day advertised afterwards.[1] If the first day is by mistake set upon a Sunday, the postponement may be effected by an advertisement before the day arrives.[2] If the day fixed for sale be afterwards appointed a legal holiday, an adjournment should be made. In such case the advertisement is not rendered invalid.[3]

If the day of sale be fixed in the announcement of the adjournment, and other notice of the adjourned sale name a different day, the sale will be irregular.[4]

The adjournment may be made to a different place than that named in the original notice, unless the place be fixed by law or by the decree; [5] though a sale adjourned to a place different from that named in the decree has been confirmed.[6]

It is the better and safer practice to advertise the adjourned sale, though this is not always essential to the legality of the sale.[7] If an adjournment be made at the request of the owner of the equity of redemption, under an agreement to allow commissions and expenses of the postponed sale, these are a personal claim against him, and cannot be taken out of the proceeds of the sale to the detriment of any one else.[8]

1635. A sale may be kept open so as to enable the mortgagee or officer making the sale to put up the property again, in case the person bidding it off fails to make good his bid. Notifying the persons brought together by the published notice that the sale would thus be held open is all that is requisite; and a sale made in accordance with such notification will not be set aside at the instance of the first bidder, in the absence of equities, and merely for the reason that it was made after the time when it was advertised to take place.[9]

1636. The objection to the mortgagee's buying at the sale, when the mortgaged property is sold under judicial process, has much less force than it has when the sale is made under a power; [10] for the judicial sale is made by an officer designated by the court

[1] La Farge *v.* Van Wagenen, 14 How. (N. Y.) Pr. 54.

[2] Westgate *v.* Handlin, 7 How. (N. Y.) Pr. 372.

[3] White *v.* Zust, 28 N. J. Eq. 107.

[4] Miller *v.* Hull, 4 Den. (N. Y.) 104.

[5] See Richards *v.* Holmes, 18 How. 143, 147.

[6] Farmers' Bank of Md. *v.* Clarke, 28 Md. 145.

[7] Stearns *v.* Welsh, 7 Hun (N. Y.), 676. This is by rule of court in **New York**.

[8] Neptune Ins. Co. *v.* Dorsey, 3 Md. Ch. 334.

[9] Isbell *v.* Kenyon, 33 Mich. 63; and see Baring *v.* Moore, 5 Paige (N. Y.), 48.

[10] See § **1876–1886**.

or by statute for the purpose, and the mortgagee for whose benefit it is made has not the actual control and management of the sale, as he has in case of a sale under a power. Accordingly in those states in which the sale under a power is taken out of the hands of the mortgagee and placed under the direction of a sheriff or other officer, the restriction against the mortgagee's buying is at the same time generally removed.[1]

Where the authority is not given to the mortgagee by statute or by judicial construction to buy at a sale under decree of court upon his own mortgage, it is sometimes provided in the decree that he may become a purchaser, and he may generally obtain leave to bid and purchase for himself.[2] It is generally for the interest of the mortgagor and others interested in the equity of redemption that he should have the right to buy, as it often happens that he will pay more for the property than any one else will pay; and it is often equally important to the mortgagee to have this power, in order to prevent a sacrifice of his own interests.[3] But under the technical rule against his purchasing, no one not interested in the equity of redemption can take advantage of his purchasing;[4] and a person entitled to do so can only redeem.

Creditors of the mortgagor, whether they be all the bondholders secured by the mortgage or a part of such bondholders, may fairly combine to purchase the property at the mortgage sale. Other creditors are not, by such combination, deprived of the right to bid at such sale.[5]

An executor or administrator of the mortgagee purchasing at the foreclosure sale holds the title for the benefit of the estate, and the land is treated as personal property.[6]

A mortgagee who becomes a purchaser under a decree made upon his own complaint is not allowed to object to the title on the ground that persons in possession of the property without

[1] See § 1882.

[2] See Conger *v.* Ring, 11 Barb. (N. Y.) 356; Domville *v.* Berrington, 2 Y. & C. 723.

In New York, by rule of court, a provision is inserted in every decree for the sale of mortgaged premises, unless otherwise specially ordered, that the plaintiff may become the purchaser. Ten Eyck *v.* Craig, 62 N. Y. 406, 421, per Andrews, J.

[3] See Holcomb *v.* Holcomb, 11 N. J. Eq. (3 Stockt.) 281.

[4] Edmondson *v.* Welsh, 27 Ala. 578.

[5] Kropholler *v.* St. Paul, Minn. & Manitoba Ry. Co. 1 McCrary, 299; Marie *v.* Garrison, 83 N. Y. 14.

[6] Valentine *v.* Belden, 20 Hun (N. Y.), 537.

title were not made parties.[1] And even if there be a defect in the proceedings he is supposed to have full notice of it, though actual notice be not shown, and is not allowed to object on account of it.[2] The plaintiff's attorney may bid off the property, and the presumption is that he is making the purchase on his own account.[3]

When the mortgagee has the right to purchase, the mortgage debt is not extinguished for any unsatisfied balance, any more than it is in case a stranger becomes the purchaser.[4]

A purchaser of land subject to a mortgage which he has agreed to assume and pay is not precluded from purchasing at a sale under the mortgage within the rule against mortgagees buying.[5]

The usual provision in a decree of foreclosure, that any of the parties to the suit may purchase on the sale, does not authorize one defendant to bid in property belonging to another, and to hold it against the latter contrary to equity.[6]

The mortgage debtor may purchase at the foreclosure sale; and his wife has the same right as any person to purchase at such sale, and to hold the property free from liability on account of her husband's debts, provided she does so in good faith and with her own money.[7]

V. *Confirmation of Sale.*

1637. Until confirmed by the court the sale is incomplete. The acceptance of the bid confers no title upon the purchaser, and not even any absolute right to have the purchase completed. He is nothing more than a preferred bidder, or proposer for the purchase, subject to the sanction of the court afterwards.[8] When this is given, it relates back to the time of sale, and carries the legal title from the delivery of the deed and the equitable title without a deed.[9] In a few states the foreclosure sale is made by a special writ of execution issued to the sheriff, and no report of

[1] Ostrom *v.* McCann, 21 How. (N. Y.) Pr. 431.

[2] Boyd *v.* Ellis, 11 Iowa, 97.

[3] Chappel *v.* Dann, 21 Barb. (N. Y.) 17; and see Squier *v.* Norris, 1 Lans. (N. Y.) 282. But see §§ **1878, 1879.**

[4] Edwards *v.* Sanders, 6 S. C. 316.

[5] McNeill *v.* McNeill, 36 Ala. 109.

[6] Bennett *v.* Austin, 81 N. Y. 308.

[7] Houston *v.* Nord, 40 N. W. Rep. 568; Mooring *v.* Little (N. C.), 4 S. E. Rep. 485.

[8] Daniell's Ch. 1454; Busey *v.* Hardin, 2 B. Mon. (Ky.) 407; Hay's Appeal, 51 Pa. St. 58, 61; Young *v.* Keogh, 11 Ill. 642; Gowan *v.* Jones, 18 Miss. (10 S. & M.) 164; Mills *v.* Ralston, 10 Kans. 206; Allen *v.* Poole, 54 Miss. 323; Wells *v.* Rice, 34 Ark. 346; Mebane *v.* Mebane, 80 N. C. 34. An order of confirmation not appealed from cuts off the right of redemption. Odd Fellows' Savings & Commercial Bank *v.* Harrigan, 53 Cal. 229.

[9] Stang *v.* Redden, 28 Fed. Rep. 11.

the sale or confirmation of it is required. Such a sale is not purely a judicial sale, which is founded upon proceedings in equity, or upon an equitable action. In those states in which foreclosure is obtained by a suit at law, as by *scire facias*, or by proceedings of a mixed nature, the sale is either ministerial or only *quasi* judicial.

The confirmation cures all mere irregularities in the proceedings to obtain the sale, and in the conduct of it;[1] but does not make good a defect arising from want of jurisdiction of the court either of the case or of any party interested; and, moreover, fraud, accident, or mistake, which will invalidate a contract generally, are grounds for setting aside the sale after confirmation.[2] If, however, the deed be executed and delivered without confirmation, long continued possession under it will make the title valid.[3]

It is no ground for refusing to order a resale that the purchaser, before confirmation, has conveyed the land, or that there is a surplus which is claimed by judgment creditors.[4] Neither the purchaser nor any one else has any right to regard the sale as concluded until it is confirmed.

Confirmation cannot be objected to on the ground that there would be no default in the payment of interest, if the sum retained as a bonus by the mortgagee at the time of the loan were applied to the payment of the legal interest upon the sum actually advanced. Usury cannot be taken advantage of in this way. "In determining whether there has been a default the court must be governed by the terms of the mortgage itself, irrespective of the question of usury. After a default thus made, a sale or its ratification can be prevented on this ground only by paying, or at least offering to pay, the sum actually loaned, with legal interest."[5] The usurious interest, when once paid, may be recovered back by an action at law, or in equity may be eliminated from the claim, upon the objection of others whose rights its allowance would injuriously affect.[6]

[1] Cross *v.* Knox, 32 Kans. 725.

[2] The statement in the text is fully illustrated by Mr. Justice Beckwith, in Dills *v.* Jasper, 33 Ill. 262; though Mr. Justice Caton, in the previous case of Jackson *v.* Warren, 32 Ill. 331, had asserted that a valid and binding contract is made when the hammer falls, and that the purchaser is entitled to a deed.

[3] Gowan *v.* Jones, 18 Miss. (10 S. & M.) 164.

[4] Wolcott *v.* Schenck, 23 How. (N. Y.) Pr. 385.

[5] Smith *v.* Myers, 41 Md. 425, 434.

[6] Ibid.

An erroneous or imperfect description of the premises in any of the proceedings is not a sufficient ground of objection to confirmation, unless it be alleged and shown that the party objecting will be prejudiced.[1]

1638. It rests wholly in the discretion of the court whether the sale shall be confirmed or not, and this power will be exercised prudently and fairly in the interest of all concerned. An order directing a resale is not subject to review or appeal.[2] The court should be satisfied that the sale has been made in accordance with the requirements of the decree;[3] and especially that notice of the sale was given as required.[4] If the sale has been regular in all respects the motion to confirm should be allowed.[5]

The confirmation is usually made by a formal order. It is the practice, generally, for the master or other officer who makes the sale to fully complete it so far as he can, by delivery of the deed and payment of the proceeds, before obtaining the order of court; but confirmation may be made in the first place of the sale, and afterwards of the deed. In England it is the practice to withhold the deed until the final order confirming the sale is made absolute.[6] One whose bid is not accepted by the officer, though it is the highest made, cannot insist upon a confirmation to himself of the sale.[7]

Confirmation of the sale can only be regularly made after notice of the motion for it to the parties adversely interested that they may show cause against it.[8] "Notice of the motion is given to the solicitors in the cause, and confirmation *nisi* is ordered by the court, — to become absolute in a time stated, unless cause is shown against it. Then, unless the purchaser calls for an investigation of the title by the master, it is the master's privilege and duty to draw the title for the purchaser, reciting in it the decree for sale, his approval of it, and the confirmation by the court of the sale, in the manner that such confirmation has been ordered."[9]

The usual order *nisi*, that the sale stand confirmed unless cause to the contrary be shown within a specified time, is a sufficient

[1] Cooper *v.* Foss, 15 Neb. 515.

[2] Goodell *v.* Harrington, 76 N. Y. 547; Hale *v.* Clauson, 60 N. Y. 339; Crane *v.* Stiger, 58 N. Y. 625.

[3] Moore *v.* Titman, 33 Ill. 358.

[4] Perrien *v.* Fetters, 35 Mich. 233.

[5] New England Mortgage Security Co. *v.* Smith, 25 Kans. 622.

[6] *Ex parte* Minor, 11 Ves. 559.

[7] Blossom *v.* R. R. Co. 3 Wall. 196.

[8] Branch Bank at Mobile *v.* Hunt, 8 Ala. 876.

[9] Williamson *v.* Berry, 8 How. 495–546, per Wayne, Justice.

order of confirmation of a sale.[1] An appeal may be taken from such order.[2]

1639. A resale may be asked for by any one whose rights are injuriously affected by the sale, although he be not a party to the suit;[3] and though he have no specific lien, provided his rights are affected.[4] The circumstances of each particular case must be inquired into and acted upon.[5] The most general principle on which the courts act in setting aside the sale and ordering a new one is that equity will not allow any unfairness or fraud, either on the part of the purchaser,[6] or of any other person connected with the sale.[7]

The application may be made by motion to the court, at any time before the report of the sale has been confirmed, notice of which should be given to every person who has appeared in the cause, or who has any interest in the sale, as well as to the purchaser.[8] A sale may be set aside, under an order upon the purchaser, to show cause, procured by the mortgagor or other defendant.[9] A sale may, however, under special circumstances, be set aside after confirmation, although more and stronger evidence of fraud or misconduct, or other grounds for invalidating the sale, is then required.[10]

It is not proper for the master or other officer who has made the sale to resell the property without an order of court, on the failure of the purchaser to comply with the terms of sale; but if he does resell upon his own responsibility, there is not necessarily sufficient ground for holding the second sale void.[11]

The court will generally impose terms and conditions upon the mortgagor, upon directing a resale, especially if the occasion for it is in any way attributable to his own negligence.[12]

The purchaser may object to the confirmation of the sale, and

[1] Torrans *v.* Hicks, 32 Mich. 307.

[2] Detroit F. & M. Ins. Co. *v.* Renz, 33 Mich. 298; Koehler *v.* Ball, 2 Kans. 160; Trilling *v.* Schumitsch, 67 Wis. 186.

[3] Kellogg *v.* Howell, 62 Barb. (N. Y.) 280.

[4] Goodell *v.* Harrington, 76 N. Y. 547.

[5] Lefevre *v.* Laraway, 22 Barb. (N. Y.) 167.

[6] Murdock *v.* Empie, 19 How. (N. Y.) Pr. 79.

[7] Stahl *v.* Charles, 5 Abb. (N. Y.) Pr. 348.

[8] Robinson *v.* Meigs, 10 Paige (N. Y.), 41; St. John *v.* Mayor & Aldermen of N. Y. 6 Duer (N. Y.), 315; *S. C.* 13 How. Pr. 527.

[9] Hubbard *v.* Taylor, 49 Wis. 68.

[10] Lansing *v.* M'Pherson, 3 Johns. (N. Y.) Ch. 424.

[11] Augustine *v.* Doud, 1 Bradw. (Ill.) 588; Dills *v.* Jasper, 33 Ill. 262.

[12] Miller *v.* Kendrick (N. J.), 15 Atl. Rep. 259.

it will not be confirmed when it appears that the title is bad or of doubtful validity.[1]

1640. Before confirmation of the sale the court may open the biddings at the instance of one who is bound to make good any deficiency, on his offering a large advance upon the bid of the mortgagee, who was the purchaser, and paying the costs of the former sale.[2] It has been the practice in England to open biddings upon the offer of a reasonable advance beyond the last bid;[3] but this practice has not prevailed very much here,[4] and its utility has been doubted or denied quite generally.[5] The opening of biddings, instead of being a practice here, is rather something that is allowed in special cases; and generally something more than inadequacy of price must be shown, unless this be very gross.

In Alabama, when the property has been purchased by the mortgagee, a resale will be ordered before confirmation if an advance of not less than ten per cent. on the former sale is offered and the money is deposited in court.[6]

1641. Great inadequacy of price may be urged with force against a confirmation of the sale, because this is incomplete and depends upon the equitable discretion of the court for completion.[7] Until the sale is approved by court the purchaser does not acquire any independent right by his purchase; he may be regarded merely as an accepted or preferred bidder. The inadequacy of price may be such as to be of itself an indication of fraud or unfairness; and if not so gross as to indicate fraud, when taken in connection with other circumstances, it is ground for setting the

[1] Trapier *v.* Waldo, 16 *S. C.* 276.

[2] Lansing *v.* M'Pherson, 3 Johns. (N. Y.) Ch. 424. In this case the offer was an advance of fifty per cent. See, also, Mott *v.* Walkley, 3 Edw. (N. Y.) 590.

[3] Garstone *v.* Edwards, 1 S. & S. 20. Vice-Chancellor Leach said: "The court does not confine itself to a particular per cent., although £10 per cent. is a sort of general rule." The advance must be at least £40 to cover expenses. Farlow *v.* Weildon, 4 Madd. 460.

[4] Williamson *v.* Dale, 3 Johns. (N. Y.) Ch. 290, 292; Lefevre *v.* Laraway, 22 Barb. 167, 173.

[5] Duncan *v.* Dodd, 2 Paige (N. Y.), 99; Collier *v.* Whipple, 13 Wend. (N. Y.) 224; Adams *v.* Haskell, 10 Wis. 123.

[6] Littell *v.* Zuntz, 2 Ala. 256.

For statutory provision in regard to confirmation of sales in New Jersey, see § 1350.

[7] See chapter XL. division 14; Vanbussum *v.* Maloney, 2 Metc. (Ky.) 550; Busey *v.* Hardin, 2 B. Mon. (Ky.) 407, 411; Williams *v.* Woodruff, 1 Duval (Ky.), 257; Taylor *v.* Gilpin, 3 Metc. (Ky.) 544; Horsey *v.* Hough, 38 Md. 130.

An offer to bid $2,400 at a resale, when the premises brought $2,000 at the original sale, is no ground for refusing to confirm. Allis *v.* Sabin, 17 Wis. 626. See, also, Bullard *v.* Green, 10 Mich. 268.

sale aside and ordering a resale; as, for instance, when a party whose interests are injuriously affected by the sale has been prevented from attending it through mistake or misapprehension.[1]

In general a resale may be had for any cause which would be a ground for setting aside the sale after confirmation; and causes of like nature, which might not be regarded as sufficient for setting aside the sale after it has been completed, will be sufficient to prevent confirmation and subject the property to a resale.[2]

A sale was confirmed against the objection of the mortgagee where the sale was regularly and fairly conducted, but the mortgagee's agent failed to attend the sale and bid upon the property and it sold for much less than its value.[3]

VI. *Enforcement of Sale against Purchaser.*

1642. One who bids off property at a foreclosure sale becomes a quasi party to the suit, so that he subjects himself to the jurisdiction of the court, and may be compelled to pay the amount bid.[4] The fact that he acts for another person will not relieve him if he makes the bid in his own name.[5] Neither lapse of time, nor the death of the original parties to the suit, will bar the right of the court to compel his compliance with the conditions of sale.[6] If, however, the delay be unreasonable, and in the mean time there has been a material change detrimental to his interests, the purchase will not be enforced. On the failure of the purchaser without good cause to comply with the terms of sale, if it appears that he is unable to perform his contract, the parties interested in the sale may, upon motion, obtain an order discharging the sale, and directing a resale; but if he is responsible, the court may order him to pay the money into court, and may enforce his submission by attachment or order to stand committed; or may order a resale of the estate, and that the defaulting purchaser pay the expenses of it, and any deficiency in price arising from it.[7]

[1] Wetzler *v.* Schaumann, 24 N. J. Eq. 60. In this case property worth $4,500 was sold for $2,600.

[2] See § **1640.**

[3] Babcock *v.* Canfield (Kans.), 13 Pac. Rep. 787.

[4] Wood *v.* Mann, 3 Sumn. 318; Requa *v.* Rea, 2 Paige (N. Y.), 339, 341; Cazet *v.* Hubbell, 36 N. Y. 677; Miller *v.* Collyer, 36 Barb. (N. Y.) 250; Goodwin *v.* Simonson, 74 N. Y. 133; Coulter *v.* Herrod, 27 Miss. 685.

[5] Atkinson *v.* Richardson, 14 Wis. 157; and see Lyon *v.* Elliott, 3 Ala. 654.

[6] Cazet *v.* Hubbell, *supra;* Merchants' Bank *v.* Thomson, 55 N. Y. 7.

[7] 2 Daniell's Ch. Pr. 1460–1462; Harding *v.* Harding, 4 Myl. & Cr. 514; Lans-

A mortgagor cannot defend against a claim for a deficiency on the ground that the premises were at first sold for a sum sufficient to pay the mortgage debt, but the purchaser failing to complete the purchase, an order was granted directing a resale, whereupon there was a deficiency, unless it appear that payment could have been enforced against the first purchaser, that the mortgagor requested the mortgagee to enforce such payment, or that the mortgagee acted fraudulently in the matter. Moreover, the mortgagor cannot defend in such case, because the mortgagee has the right to elect either to proceed against the purchaser to enforce his liability upon his bid, or to apply for a resale; and having chosen the latter remedy, and the court having ordered a resale, the order is conclusive, and releases the mortgagee from any obligation to institute proceedings to recover the deficiency of the purchaser.[1]

A mortgagee who has bid a much larger sum than the amount of the decree of sale cannot be relieved from his bid on the ground that he had been advised that he would not be required to pay over the surplus to the mortgagor; the mistake alleged being one of law and not one of fact.[2]

1643. Performance is enforced by attachment.[3] — The proper tribunal to enforce the purchaser's undertaking is that in which the decree of sale was made, and the application may be by motion.[4] The mode of enforcing compliance with the order of court is by attachment against the person.[5] The fact that upon the purchaser's default remedy may be had by a resale of the lands, or by suit against him for damages, does not deprive the court of the right to enforce performance in this summary way; the option as to remedy lies with the court or the party selling, and not with the purchaser.[6] Even after the purchaser has complied with the terms of sale, by paying part cash and giving a bond and security for the balance, and the sale has been confirmed by court, he may upon his failure to pay the bond be proceeded against by a rule

down *v.* Elderton, 14 Ves. 512; Goodwin *v.* Simonson, 74 N. Y. 133.

It was formerly the rule that a forfeiture of the deposit was the only redress against the purchaser. Savile *v.* Savile, 1 P. Wms. 745.

[1] Goodwin *v.* Simonson, *supra.*

[2] Shear *v.* Robinson, 18 Fla. 379.

[3] Clarkson *v.* Read, 15 Gratt. (Va) 288; Anderson *v.* Foulke, 2 Har. & Gill (Md.), 346; Richardson *v.* Jones. 3 Gill & Johns. (Md.) 163; Gordon *v.* Saunders, 2 McCord (S. C.) Ch. 151; Brasher *v.* Cortlandt, 2 Johns. (N. Y.) Ch. 505.

[4] Wood *v.* Mann, 3 Sumn. 318, 326.

[5] Graham *v.* Bleakie, 2 Daly (N. Y.), 55; Miller *v.* Collyer, 36 Barb. (N. Y.) 250.

[6] Wood *v.* Mann, *supra;* Cazet *v.* Hubbell, 36 N. Y. 677.

made upon him to show cause why the land should not be sold for the payment of the purchase money; and upon that proceeding a decree may be made for the sale of the land.[1]

In a case where the purchaser refused to complete the purchase after having made a small deposit, he was ordered to show cause why an attachment should not issue against him. The Chancellor said that he had no doubt of the power of the court to coerce a purchaser where the conditions of sale had not given an alternative; and that in this case the forfeiture of the deposit would not be sufficient, either as punishment to the one party or a satisfaction to the other. He was ordered to pay the money in six days, or that an attachment issue.[2]

The fact that the purchaser has been ordered to complete the purchase, after a specific objection to the title or to the parties, does not decide a question of title not brought to the consideration of the court by objection, and is no protection to the purchaser against persons having vested interests in the equity of redemption, who ought to have been, but were not, made parties to the suit.[3]

In order to hold a purchaser for a deficiency upon a resale, the terms of the resale should be substantially the same as the terms upon which the first sale was made. A resale under different terms would not afford a just measure of the liability of a defaulting purchaser. If the terms of the resale differ materially from those of the original sale, the mortgagee cannot collect from the former purchaser a deficiency arising under the second sale; and the court may order that the purchaser be relieved from his purchase and from paying any deficiency.[4]

1644. Forfeiture of deposit. — If the purchaser without good cause does not complete the purchase, he forfeits the deposit made at the time of sale, so far as it may be needed to make up a deficiency in price on a resale.[5] He is also chargeable with the expenses of the resale.[6] A resale is ordered, and if there is a loss

[1] Clarkson *v.* Read, 15 Gratt. (Va.) 88. In Richardson *v.* Jones, 3 Gill & Johns. (Md.) 163, it was held, contrary to the decision above, that the power of the court does not extend to enforcing sales on credit, after the purchaser has once complied with the terms of sale by giving security; that the remedy is at law on the security.

[2] Brasher *v.* Cortlandt, 2 Johns. (N. Y.) Ch. 505.

[3] Williamson *v.* Field, 2 Sandf. (N. Y.) Ch. 533.

[4] Riggs *v.* Pursell, 74 N. Y. 370.

[5] Willets *v.* Van Alst, 26 How. (N. Y.) Pr. 325.

[6] Knight *v.* Moloney, 4 Hun (N. Y.), 33. But he is not chargeable with the

in price from the former sale, judgment may be had against the purchaser for the difference towards which the deposit will be applied.[1] When it is desired to hold a third person responsible for the loss as the real purchaser, instead of the person who bid at the sale, the order for resale should require the payment to be made by him, and the suit cannot be maintained against him, when the order requires the payment to be made by the bidder.[2] If on the purchaser's default a resale be made, without any application to the court, to the same purchaser, he is liable only on his bid at the second sale.[3]

1645. If there be a defect in the title unknown to the purchaser at the time of sale, the court will not ordinarily compel him to take a deed and complete the purchase.[4] An inchoate right of dower is such a defect; and so is a prior mortgage, or other lien or charge upon the land.[5] If there be a defect in the title to a part of the land, the court will not allow the purchaser to reject that part alone and have a deduction from the purchase price, and take title to the remainder; though he may refuse to complete the purchase, and move for return of the deposit made.[6]

The innocent bidder is entitled to be repaid his proper expenses. These include the deposit paid by him on the sale, the expenses of the examination of the title, and the costs of the motion for repayment.[7] The repayment is made out of the funds in the case if there are any; and if not, the plaintiff must pay the expenses in the first instance, but may recover them over in a suit or upon a resale. If, however, the defect in the proceedings result from the plaintiff's negligence in omitting to make some one interested under the mortgage a party to the suit, as, for instance, the owner of the equity of redemption, such expenses cannot be deducted from the surplus moneys arising from the

expense of curing a formal irregularity in the foreclosure. *S. C.* 2 N. Y. Weekly Dig. 40.

[1] Graham *v.* Bleakie, 2 Daly (N. Y.), 55.

[2] Paine *v.* Smith, 2 Duer (N. Y.), 298.

[3] Home Ins. Co. *v.* Jones, 45 How. (N. Y.) Pr. 498.

[4] People *v.* Knickerbocker L. Ins. Co. 66 How. (N. Y.) Pr. 115.

[5] Fryer *v.* Rockefeller, 63 N. Y.), 268; Merchants' Bank *v.* Thomson, 55 N. Y. 7; Simar *v.* Canaday, 53 N. Y. 298; Mills *v.* Van Voorhies, 20 N. Y. 412; Hirsch *v.* Livingston, 3 Hun (N. Y.), 9; *S. C.* 48 How. Pr. 243; Veeder *v.* Fonda, 3 Paige (N. Y.), 94; Seaman *v.* Hicks, 8 Paige (N. Y.), 655; Shiveley *v.* Jones, 6 B. Mon. (Ky.) 274.

[6] Thompson *v.* Schmieder, 38 Hun (N. Y.), 504.

[7] Morris *v.* Mowatt, 2 Paige (N. Y.), 586.

second sale, as these belong to the owner of the equity, and he is not responsible for the irregularity in the sale.[1]

1646. Defect in the title prior to the mortgage does not excuse the purchaser from carrying out his purchase. He buys the title of the mortgagor as it existed at the time of the making of the mortgage, and nothing more. The foreclosure cuts off the equity of redemption, and by the sale he gets the mortgage title divested of all rights of the mortgagor and those claiming under him subsequent to the mortgage. He takes the risk of the mortgagor's having any title that passed by the mortgage.[2] If the title by the mortgage purports to be an estate in fee, when it is in fact only a leasehold interest, although the judgment, following the terms of the mortgage, erroneously directs a sale of the premises as in fee, the purchaser is bound by the sale, if he has notice at the time of the facts, and of the leasehold title of the mortgagor. The sale under the judgment transfers whatever title the mortgagor had.[3] The purchaser cannot be relieved on account of defects in the property, or in the title to it, of which he had notice, and in reference to which he may be supposed to have bid.[4]

A purchaser at a foreclosure sale is presumed to know the condition of the title which he purchases. If the mortgage contains no covenant of warranty, and the title proves defective, the purchaser has no claim upon the mortgagor to make it good; nor will any outstanding and paramount title subsequently acquired by the mortgagor enure to the benefit of the purchaser; although while the relation of mortgagor and mortgagee existed a title acquired subsequent to the mortgage would go to strengthen the mortgage security. When that relation is extinguished by foreclosure, the mortgagor is under no obligation to protect the purchaser's title.[5] So also the purchaser is affected with notice of all the defects and irregularities of the foreclosure and sale that appear of record, and is bound to take notice that a junior mort-

[1] Raynor *v.* Selmes, 52 N. Y. 579, reversing *S. C.* 7 Lans. 440.

[2] Fryer *v* Rockefeller, 4 Hun (N. Y.), 800; *S. C.* 63 N. Y. 268; Riggs *v.* Pursell, 66 N. Y. 193; Holden *v.* Sackett, 12 Abb. (N. Y.) Pr. 473; Boggs *v.* Fowler, 16 Cal. 559; Strong *v.* Waddell, 56 Ala. 471; and see Osterberg *v.* Union Trust Co. 93 U. S. 424.

[3] Graham *v.* Bleakie, 2 Daly (N. Y.), 55.

[4] Riggs *v.* Pursell, 66 N. Y. 193; *S. C.* 74 N. Y. 371.

[5] Jackson *v.* Littell, 56 N. Y. 108.

gagee, or other incumbrancer of record, was not made a party to the suit, and therefore may redeem.[1]

The purchaser, after having completed the sale and paid over the money, cannot call upon the mortgagee to make restitution of any part of it on the ground that the title has proved defective, and the purchaser has been forced to pay a further sum to perfect it. His only remedy is to avail himself of the covenants of the several conveyances preceding the conveyance to the mortgagee.[2]

1647. Errors in the decree or in the proceedings under it afford no ground for relieving the purchaser from the sale, after its confirmation.[3] Of course the purchaser may take objection, even after confirmation, to a defect arising from a want of jurisdiction in the court;[4] but he need not look further than to the judgment, and the deed given in execution of it, so long as they stand unimpeached. Erroneous rulings in the case upon questions of law do not concern him.[5] Even if the decree be erroneous it cannot be attacked collaterally.[6] After a decree and sale under it, the validity of the mortgage cannot again be called in question.[7] If the decree was valid, and the execution and deed are regular, a purchaser in good faith acquires a good title to the property, although, as against the mortgagor, the decree was erroneous.[8]

A purchaser, however, under the foreclosure of an unregistered mortgage, is not such a *bonâ fide* purchaser as to acquire any rights against one who had taken a conveyance from the mortgagor after the mortgage and before foreclosure, and who was in possession at the time of the foreclosure sale.[9] Although the mortgage has been paid but left undischarged of record, one purchasing in good faith at a foreclosure sale under the mortgage acquires a good title as against the mortgagor and those claiming under him.[10]

[1] McKernan *v.* Neff, 43 Ind. 503; Piel *v.* Brayer, 30 Ind. 332; Alexander *v.* Greenwood, 24 Cal. 505.

[2] McMurray *v.* Brasfield, 10 Heisk. (Tenn.) 529.

[3] Worsham *v.* Hardaway, 5 Gratt. (Va.) 60; Threlkelds *v.* Campbell, 2 Gratt. (Va.) 198; Daniel *v.* Leitch, 13 Gratt. (Va.) 195; Splahn *v.* Gillespie, 48 Ind. 397; Sowles *v.* Harvey, 20 Ind. 217.

[4] Boggs *v.* Fowler, 16 Cal. 559.

[5] Mills *v.* Ralston, 10 Kans. 206.

[6] Ogden *v.* Walters, 12 Kans. 282.

[7] Gest *v.* Flock, 2 N. J. Eq. (1 Green) 108.

[8] Splahn *v.* Gillespie, *supra*.

[9] Hawley *v.* Bennett, 5 Paige (N. Y.), 104.

[10] Atwater *v.* Seymour, Brayt. (Vt.) 209.

1648. Reference as to title. — While the purchaser under a judicial sale submits himself to the jurisdiction of the court, and may be compelled to carry out his contract, he is also entitled to the protection of the court in respect to the avoidance of the purchase, if by reason of imperfections in the title or otherwise he is freed from his agreement.[1] He may apply for a reference to inquire into the title. The abstract of title and deeds and the statement of facts being laid before the referee, the purchaser may examine them and file objections. If the report be against the title, the purchaser may move to be discharged and for a return of his deposit and for costs.[2] It is well settled that if there be a reasonable doubt as to the soundness of the title the court will not compel the purchaser to complete the purchase, even if the better opinion be that the title is good.[3]

If the master upon examination of the abstract of title, and the facts bearing upon it, reports that the title is defective or doubtful, the purchaser may upon motion be discharged, and have an order for the repayment of his deposit and for the costs of the reference.[4] He will not of course be compelled to complete the purchase if the proceedings for any reason were void, as for want of jurisdiction in the court to entertain the case; or if a party in interest, as, for instance, one tenant in common of the premises, has not been served with process;[5] or if an incumbrancer is not made a party to the suit.[6] A bidder's liability is terminated if the sale is not reported to the court, or approved when reported; or if the master sells the property again on his own responsibility, and this sale is approved by the court.[7]

If the defect in the title be such that it may be cured, and within a reasonable time releases are obtained or other acts done to remedy the defect, the purchaser cannot refuse to complete the purchase.[8] On the other hand, delay in taking the deed on account of defects in the title, all the parties apparently acquiescing and the purchaser holding possession, is no ground for the

[1] Hoffman's Referees, 240.

[2] Ibid. 241, 242.

[3] Abel *v.* Heathcote, 2 Ves. 98, 100; Stapylton *v.* Scott, 16 Ves. 272; Piser *v.* Lockwood, 30 Hun (N. Y.), 6.

[4] Graham *v.* Bleakie, 2 Daly (N. Y.), 55; and see Ormsby *v.* Terry, 6 Bush (Ky.), 553.

[5] Cook *v.* Farnham, 21 How. (N. Y.) Pr. 286; *S. C.* 34 Barb. (N. Y.) 95; 12 Abb. Pr. 359.

[6] Verdin *v.* Slocum, 71 N. Y. 345.

[7] Dills *v.* Jasper, 33 Ill. 262.

[8] Graham *v.* Bleakie, *supra.* In Coffin *v.* Cooper, 14 Vesey, 205, Lord Chancellor Eldon said: "Where the master's report is, that the vendor, getting in a term, or getting administration, will have a title, the court will put him under terms to procure that speedily."

mortgagor's claiming a right to redeem, and to have an accounting by the purchaser for the rents received by him.[1]

If, however, a party in interest has not been made a party to the suit, though this is a ground upon which the purchaser may be relieved from his purchase, he cannot hold on to it, and insist upon having his title perfected by the application of the proceeds of the sale to the payment of the outstanding claim.[2]

1649. Taxes. — Neither will a purchaser be required to complete the purchase when he will not obtain such an interest in the property as he had a right to suppose from the terms of sale he was buying.[3] Where by the terms of sale the premises are sold free from incumbrances, the taxes and assessments to be paid out of the purchase money, and there is a large assessment still unconfirmed by the municipal authorities, and which cannot be paid, the purchaser is not bound to complete the purchase and take the property subject to the assessment.[4] If, however, the property can be relieved of incumbrance by payment of the tax, the court may direct the master to satisfy the claim out of the proceeds of sale, and thus relieve the title from the objection.[5]

The purchaser himself cannot retain from his bid a sum sufficient to pay the taxes.[6]

1650. A purchaser may by his conduct preclude the opening of the sale. If, during the progress of a foreclosure sale, he has announced to the other bidders that he had prior incumbrances on the property, and that the sale would be made subject to these, he cannot consistently ask to be relieved from his own bid, on the ground that he supposed he would be entitled to have the surplus money applied to the payment of his prior incumbrances. He must be presumed to understand that if others on his own announcement were bidding for the property, subject to the incumbrances, he was competing with them on equal terms.[7]

A purchaser may also by his own conduct with reference to the property practically confirm a sale, so as to preclude himself from having the sale opened; as where he has taken possession of the

[1] Belter *v.* Lyon, 13 Daly (N. Y.), 422.

[2] Duvall *v.* Speed, 1 Md. Ch. Dec. 229, 235.

[3] Seaman *v.* Hicks, 8 Paige (N. Y.), 655.

[4] Post *v.* Leet, 8 Paige (N. Y.), 337; see, also, Easton *v.* Pickersgill, 55 N. Y. 310.

[5] Lawrence *v.* Cornell, 4 Johns. (N. Y.) Ch. 542.

[6] Osterberg *v.* Union Trust Co. 93 U. S. 424.

[7] Ledyard *v.* Phillips, 32 Mich. 13.

premises under a claim of title derived from the sale, paid laborers for work upon them, and made arrangements for planting crops for the following year.[1]

1651. An irregularity in the foreclosure proceedings which is merely formal, and cannot result in injury to the purchaser, is no ground for his refusing to complete the purchase; and if on his refusal to complete the purchase a resale is ordered, he is chargeable with the expenses of it.[2] The purchaser has a right to insist upon the terms of his purchase being complied with. Where by agreement of the parties the referee sold the premises on time, the purchaser cannot be compelled to pay cash.[3]

Judicial sales must be conducted with the utmost fairness and good faith; and if a purchaser at a sale under a decree of foreclosure of a junior mortgage is by false representations induced to believe that the proceeds of the sale will be applied to payment of the prior mortgage, and that he would take a clear title, the sale will be set aside;[4] and so also it will be set aside where the purchaser thought he was buying an absolute title to the land, and not one subject to the first mortgage.[5]

VII. *The Deed, and passing of Title.*

1652. It is a recognized practice to allow another person to be substituted for the purchaser, and to take the deed directly to himself.[6] Any equitable rights or liens acquired by third persons against the original purchaser before the assignment are protected. Where the original purchaser had entered into a contract of sale of the premises with another, and had died, in the absence of his heir, the court ordered a conveyance to the substituted purchaser, and the payment of the money into court.[7]

If the purchase be made by a third person for the mortgagor, who pays the price, the mortgagor is entitled to a release of the mortgage upon tendering the deed to be signed.[8]

1653. Delivery of deed. — The master's deed passes the title

[1] Ledyard *v.* Phillips, 32 Mich. 13.

[2] Knight *v.* Moloney, 4 Hun (N. Y.), 33.

[3] Rhodes *v.* Dutcher, 6 Hun (N. Y.), 453.

[4] Paulett *v.* Peabody, 3 Neb. 196.

[5] Shiveley *v.* Jones, 6 B. Mon. (Ky.) 274. See Vanderkemp *v.* Shelton, 11 Paige (N. Y.), 28.

[6] Proctor *v.* Farnam, 5 Paige (N. Y.), 619; Rorer on Jud. Sales, 145; Ehleringer *v.* Moriarty, 10 Iowa, 78; McClure *v.* Englehardt, 17 Ill. 47; Splahn *v.* Gillespie, 48 Ind. 397; Culver *v.* McKeown, 43 Mich. 322.

[7] Pearce *v.* Pearce, 7 Sim. 138.

[8] Bush *v.* Macklin (Ky.), 9 S. W. Rep. 420.

to the purchaser at the moment of delivery, though the sale has not been confirmed.[1] From that time the property is at his risk, and having accepted the deed he cannot repudiate the contract.[2] From that time, and from that time only, the co-tenancy of a purchaser of the interest of a tenant in common sold on foreclosure commences, with the liability of accounting for rents and profits, repairs and improvements.[3] The holder of the deed has *primâ facie* a valid title to the land described in it.[4] In England the practice is to withhold the deed until the final order confirming the sale is made absolute, but the confirmation relates back to the delivery of the deed, and gives it effect from that time.[5] The practice in this country in this regard is not uniform. The better practice is to report the sale and obtain a confirmation of it before the delivery of the deed; but in some states, and especially in those in which a time for redemption is allowed after the sale, it is the practice to delay the report until the deed is executed and delivered.[6] If in such case the mortgagor delays to move for the filing of the report and the setting aside of the sale until the deed is delivered, he is regarded as waiving all objections to the sale which are merely formal.[7]

When a judgment in foreclosure provides that the purchaser shall be let into possession upon production of the referee's deed, the purchaser acquires no title or right of possession until the delivery of the deed to him, and therefore he is not entitled to the rents from the time of sale by relation back, although he is charged with interest on the purchase money from that time; until the deed is given, the owner of the equity is entitled to the possession of the land and to the rents.[8] Upon the delivery of the deed the purchaser is entitled to the proper process of court for the delivery of possession to him as against all the defendants

[1] Fuller *v.* Von Geesen, 4 Hill (N. Y.), 171; *S. C.* 4 How. Pr. 182; Fort *v.* Burch, 6 Barb. (N. Y.) 60; Mitchell *v.* Bartlett, 51 N. Y. 447; *S. C.* 52 Barb. 319. For form of sheriff's or referee's deed used in New York, see 5 Wait's Prac. 225, 226.

[2] Jones *v.* Burden, 20 Ala. 382.

[3] Davis *v.* Chapman, 36 Fed. Rep. 42.

[4] Jackson *v.* Warren, 32 Ill. 331; Simerson *v.* Branch Bank, 12 Ala. 205.

[5] *Ex parte* Minor, 11 Ves. 559.

[6] Walker *v.* Schum, 42 Ill. 462. In Illinois this was the practice before the enactment allowing redemption after the sale. But since this statute the report is not generally made until after the deed is executed and delivered, and sometimes it is never reported and confirmed at all.

[7] Walker *v.* Schum, *supra;* Fergus *v.* Woodworth, 44 Ill. 374, 379.

[8] Mitchell *v.* Bartlet, *supra.* See, to the contrary, however, Lathrop *v.* Nelson, 4 Dill. 194.

who were before the court.[1] When consummated by the deed, the sale passes as against them the entire estate held by the mortgagor, whatever it may have been at the date of the mortgage; and the purchaser is entitled upon the receipt of his deed to the possession of the premises, even though the plaintiff pending the action has conveyed the property to one of the defendants.[2] If the mortgagee be the purchaser, and before a deed is made receives from the mortgagor the amount of the decree, the sale and confirmation under it are rendered void.[3]

1654. As the title of the purchaser relates back to the time of the execution of the mortgage, it does not matter to him what disposition the mortgagor may afterwards have made of the property if the foreclosure is perfect. All conditions and reservations and easements, as well as all incumbrances or liens, he may have afterwards imposed upon the property are extinguished.[4] In this respect the purchaser's rights are the same whether the sale be under a decree of a court of equity, under a judgment in *scire facias*, or under a power in the mortgage or trust deed. The title takes effect by virtue of the original deed; the sale carries that title, and cuts off all liens and interests created subsequent to the mortgage.

Title acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights. If all subsequent purchasers and incumbrancers are made parties to the bill, the title under the mortgage foreclosed is perfected to an absolute one. In such case the purchaser acquires the title of the mortgagee, and also the title of the mortgagor as it stood at the time of the making of the mortgage.[5] If the mortgage was of an undivided interest in common with others, the purchaser ac-

[1] Frisbie *v.* Fogarty, 34 Cal. 11.

[2] Montgomery *v.* Middlemiss, 21 Cal. 103; Belloc *v.* Rogers, 9 Cal. 123, 125.

[3] Applegate *v.* Kingman, 17 Neb. 338.

[4] King *v.* McCully, 38 Pa. St. 76; Davis *v.* Conn. Mut. Life Ins. Co. 84 Ill. 508; Shaw *v.* Heisey, 84 Iowa, 468; Rugles *v.* First Nat. Bank of Centreville, 43 Mich. 192; Gamble *v.* Horr, 40 Mich. 561; Bull's Petition (R. I.), 10 Atl. Rep. 484.

[5] Ritger *v.* Parker, 8 Cush. Mass. 145; Brown *v.* Tyler, 8 Gray (Mass.), 135; Marston *v.* Marston, 45 Me. 412; Haynes *v.* Wellington, 25 Me. 458; Taylor *v.* Kearn, 68 Ill. 339; Vroom *v.* Ditmas, 4 Paige (N. Y.), 526, 531; Christ Church *v.* Mack, 93 N. Y. 488; Slattery *v.* Schwannecke, 44 Hun (N. Y.) 75; McMillan *v.* Richards, 9 Cal. 365; Poweshiek Co. *v.* Dennison, 36 Iowa, 244; Carter *v.* Walker, 2 Ohio St. 339; Frische *v.* Kramer, 16 Ohio, 125; Hodson *v.* Treat, 7 Wis. 263; De Haven *v.* Landell, 31 Pa. St. 120; West Branch Bank *v.* Chester, 11 Pa. St. 282; Hamilton *v.* State, 1 Ind. 128; Sellwood *v.* Gray, 11 Oreg. 534; Watson *v.* Dundee M. & T. I. Co. 12 Oreg. 474; Baldwin *v.* Howell (N. J.), 15 Atl. Rep. 236.

quires the same interest.[1] He obtains the title of all the parties to the suit, whether their title be that which is set forth in the bill or not. Whatever the title of the parties to the suit may be, that is what the court undertakes to sell, and what the purchaser is entitled to have conveyed to him.[2] The fact that the purchaser at a foreclosure sale under a first mortgage had previously bought the equity subject to a second mortgage, which he did not expressly stipulate to pay, does not prevent his acquiring a perfect title against that mortgage by the purchase.[3] The mortgagor is estopped from denying the title he has set forth in his mortgage;[4] and all the parties to the foreclosure suit are estopped from disputing the title acquired by the purchaser under the sale.[5] The purchaser occupies the same position, as to the priority of claims or liens on the property, that the mortgagee did.[6]

After a foreclosure sale a mortgagee has no such ownership of the property as will enable him to charge the premises with a lien for labor done and materials furnished.[7]

The purchaser acquires the benefit of a covenant of warranty contained in the deed conveying the property to the mortgagor, and may recover for a breach of it.[8]

1655. Errors in deed. — If the master's deed by inadvertence embraces the whole mortgaged premises, of which a portion had been released from the operation of the mortgage and was excepted from the operation of the decree, no title to the released portion passes to the purchaser.[9] Even if this portion of the premises had been embraced in the decree, but were not offered at the sale, the title would not pass by the conveyance.[10]

Where a mortgage, by reason of an error in the description, did not cover the entire tract intended to be mortgaged, and the error was first discovered after a foreclosure sale and conveyance to a purchaser who supposed he was buying the whole tract, he

[1] Mahoney *v.* Middleton, 41 Cal. 41.

[2] Zollman *v.* Moore, 21 Gratt. (Va.) 313; Gillett *v.* Eaton, 6 Wis. 30; Tallman *v.* Ely, 6 Wis. 244; Mount *v.* Manhattan Co. (N. J.) 9 Atl. Rep. 114; Young *v.* Brand, 15 Neb. 601, quoting text.

[3] Brown *v.* Winter, 14 Cal. 31.

[4] Vallejo Land Asso. *v.* Viera, 48 Cal. 572.

[5] McGee *v.* Smith, 16 N. J. Eq. 462; White *v.* Evans, 47 Barb. (N. Y.) 179; Holden *v.* Sackett, 12 Abb. (N. Y.) Pr. 473.

[6] Davis *v.* Conn. Mut. Life Ins. Co. 84 Ill. 508.

[7] Davis *v.* Conn. Mut. Life Ins. Co. *supra.*

[8] Mygatt *v.* Coe, 44 Hun (N. Y.), 31.

[9] Laverty *v.* Moore, 32 Barb. (N. Y.) 347.

[10] Laverty *v.* Moore, 33 N. Y. 658, affirming the above.

was protected in the possession of the whole.[1] Usually, however, the property to which the purchaser acquires title is coextensive with the description contained in the mortgage, the bill to foreclose, and the order or writ under which the sale is made.[2]

After the sale is completed and the money paid over by the purchaser, he cannot have the sale set aside and the money repaid by reason of a mistake in the mortgage deed, whereby land not belonging to the mortgagor was described instead of his own land.[3]

1656. After-acquired title. — Ordinarily the title ordered to be sold is only the title which was held by the mortgagor at the date of the mortgage.[4] But a title subsequently acquired by the mortgagor will generally be subjected to the lien of the mortgage when that contains full covenants of warranty,[5] even if it was given to secure the purchase money of land, the title of which proves defective and the mortgagor makes it good from another source, the mortgagee having conveyed to him without covenants and without fraud;[6] and even a title acquired by a purchaser from the mortgagor after his purchase may, under equitable circumstances, be subjected to the lien in the same manner. But in order to subject such after-acquired title to sale, the facts should be set forth in the complaint, and the decree should expressly cover the after-acquired title.[7]

A title acquired by the owner under a tax sale before the sale under the mortgage passes to the purchaser. This rule holds good even in case the assessment on which the taxes were levied was made after the decree of foreclosure, where the foreclosure sale was made after the tax sale; for it is the duty of the person who was the owner at the time the taxes were levied and became payable, to pay them.[8]

1657. Fixtures. — The purchaser's deed taking effect by relation at the date of the mortgage passes the property as it then was, with all fixtures subsequently annexed by the mortgagor, such as an engine and boilers used in a flour-mill and permanently

[1] Waldron *v.* Letson, 15 N. J. Eq. 126.

[2] McGee *v.* Smith, 16 N. J. Eq. 462.

[3] Neal *v.* Gillaspy, 56 Ind. 451.

[4] San Francisco *v.* Lawton, 18 Cal. 465.

[5] Bybee *v.* Hageman, 66 Ill. 519; Haggerty *v.* Byrne, 75 Ind. 499; Brayton *v.* Merithew, 56 Mich. 166; Rice *v.* Kelso, 57 Iowa, 115; Land. Asso. *v.* Viera, 48 Cal. 572.

[6] Hitchcock *v.* Fortier, 65 Ill. 239. Otherwise where the mortgage contained no covenants of warranty. Smith *v.* De Russy, 29 N. J. Eq. 407.

[7] Kreichbaum *v.* Melton, 49 Cal. 50.

[8] Barnard *v.* Wilson (Cal.), 16 Pac. Rep. 307.

attached to the premises.[1] The rule, that whatever is fixed to the freehold becomes a part of it, applies as strictly between the mortgagor and mortgagee as between vendor and vendee.[2] The purchaser acquires title to the fixtures as a part of the realty. If they are wrongfully severed by any one after the sale, though before the execution of a deed to the purchaser, he may sue for them in trover, take them by replevin,[3] or may recover damages in an action of waste.[4] A mortgagee who comes into possession of the premises, by virtue of a decree of strict foreclosure, acquires title to a barn erected on the premises during the pendency of the foreclosure suit by a stranger with permission of the mortgagor.[5]

1658. The purchaser is entitled to the crops growing at the time of the sale to him, in preference to the mortgagor or any one claiming under him whose claim originated subsequently to the mortgage;[6] and he is entitled in preference to one who bids off the property at a sale subsequently made by the assignee in bankruptcy of the mortgagor.[7] After the sale, while awaiting confirmation thereof, and a delivery of the deed and possession, the purchaser may, it seems, upon application to the court, have an injunction restraining the mortgagor and others claiming under him from meddling with the crops.[8] The confirmation of the sale relates back to the sale, and entitles the purchaser to the crops from that time if no equities prevent and due notice has been given to interested parties.[9] If, however, the growing crop be expressly reserved at the sale, it having been previously sold by the mortgagee as administrator of the mortgagor, the purchaser acquires no title to it.[10] But the sheriff or other officer in selling has no authority to reserve the way-going crops. If he

[1] See §§ 428–452; Sands *v.* Pfeiffer, 10 Cal. 258.

[2] Gardner *v.* Finley, 19 Barb. (N. Y.) 317.

[3] §§ 453–455.

[4] Lackas *v.* Bahl, 43 Wis. 53.

[5] Preston *v.* Briggs, 16 Vt. 124.

[6] § 697; Shepard *v.* Philbrick, 2 Den. (N. Y.) 174; Jones *v.* Thomas, 8 Blackf. (Ind.) 428; Lane *v.* King, 8 Wend. (N. Y.) 584; Crews *v.* Pendleton, 1 Leigh (Va.), 297; Parker *v.* Storts, 15 Ohio St. 351; Anderson *v.* Strauss, 98 Ill. 485; Rankin *v.* Kinsey, 7 Bradw. (Ill.) 215; Sugden *v.* Beasley, Ib. 71, quoting text; Scriven *v.* Moote, 36 Mich. 64; Calvin *v.* Shimer (N. J.), 15 Atl. Rep. 255; Beckman *v.* Sikes, 35 Kans. 120; Perley *v.* Chase (Me.), 11 Atl. Rep. 418; Montgomery *v.* Merrill, 65 Cal. 432; Kerr *v.* Hill, 27 W. Va. 576.

In Cassilly *v.* Rhodes, 12 Ohio, 88, it was held that a tenant of the mortgagor was entitled to the annual crops.

[7] Gillett *v.* Balcom, 6 Barb. (N. Y.) 370.

[8] Ruggles *v.* First Nat. Bank of Centreville, 43 Mich. 192; Mut. Life Ins. Co. *v.* Bigler, 79 N. Y. 568.

[9] Ruggles *v.* First Nat. Bank of Centreville, *supra.*

[10] Sherman *v.* Willett, 42 N. Y. 146.

does so, but does not make the reservation in the deed, it will pass the crops to the purchaser.[1]

But in states where a mortgage creates no estate in the mortgagee, but confers on him only a lien, the rule has been established that the mortgagor or his tenant may claim the crops he has sown which are growing at the time of the foreclosure of the mortgage.[2]

1659. The rents accruing between the day of sale and the delivery of the deed belong to the owner of the equity of redemption, and not to the purchaser, as they go with the possession, or the right of possession; and generally the purchaser is not entitled to possession, or to the rents, until he has made a demand for possession under his deed.[3] If, however, the purchaser is already in possession under a former purchase at a sale not confirmed, he is entitled to the rents from the date of the confirmation of the last report of sale.[4]

The purchaser is entitled to rents from the tenants notwithstanding they have paid the rent in advance to the mortgagor for a period extending beyond the time of the delivery of the deed to the purchaser.[5]

By statute the judgment debtor not redeeming may be made liable to the purchaser for the rent of the premises, or for use and occupation of the same after the sale;[6] or the purchaser may be entitled to receive the rents of the property, or the value of the use and occupation.[7]

1660. When a mortgagee purchases at a sale of the premises under a decree of court, no deed from the trustee appointed to make the sale is requisite to invest him with the legal title. The decree of sale does not of course operate as a conveyance of the legal title, but the purchaser, though a stranger, becomes the substantial owner of the property from the moment the sale is ratified. He is entitled to possession, and no one can eject him.

[1] Howell *v.* Schenck, 24 N. J. L. (4 Zab.) 89.

[2] Heavilon *v.* Farmers' Bank, 81 Ind. 249, reversing Jones *v.* Thomas, 8 Blackf. 428, which was decided when the rule in Indiana was that a mortgage creates an estate in the mortgagee. Allen *v.* Elderkin, 62 Wis. 627; Gregory *v.* Rosenkrans (Wis.), 39 N. W. Rep. 378.

[3] § 1120; Taliaferro *v.* Gay, 78 Ky. 496; Clason *v.* Corley, 5 Sandf. (N. Y.) 447; Astor *v.* Turner, 11 Paige (N. Y.), 436; Mitchell *v.* Bartlett, 52 Barb. (N. Y.) 319.

[4] Taliaferro *v.* Gay, *supra.*

[5] Hatch *v.* Sykes (Miss.), 1 So. Rep. 248.

[6] As in **Indiana**: 2 R. S. 1876, p. 720; Gale *v.* Parks, 58 Ind. 117; Clements *v.* Robinson, 54 Ind. 599.

[7] As in **California**: Code of Civ. Proc. § 707; Walker *v.* McCusker, 12 Pac. Rep. 723; Page *v.* Rogers, 31 Cal. 293.

But when the mortgagee purchases the title, according to the doctrine of the common law the legal title is already in him, and the sale confirms him in the possession of the property; and without a deed from the trustee he can maintain ejectment for the property.[1]

1661. The purchaser has no legal title until the time allowed for redemption has expired.[2] He cannot on his certificate of purchase maintain ejectment or other possessory action. He is not entitled to possession until a deed has been executed to him by the officer selling.[3] He acquires only a lien; no new title vests till the period of redemption has passed. His deed will relate back, it is true, to the beginning of his lien, in order to cut off intervening incumbrances; but it will not carry back the absolute divestiture of title, as is evident from the fact that neither judgment debtor nor mortgagor can be called to account for rents and profits. His title becomes absolute only when his right to a deed accrues. The mortgagor still has the estate of a mortgagor, with this qualification, that the amount and time of redemption have become absolutely fixed by the decree of sale, and his estate will be absolutely divested if he fails to redeem within the allotted time.[4]

But the mortgagor, though entitled to the possession until the period of redemption has expired, is liable for any injury he may do to the premises by cutting and carrying away growing timber.[5] He might be restrained from committing waste by injunction.[6]

1662. An appeal does not affect a sale previously made. The judgment of the court being conclusive so long as it stands unreversed and without appeal, a sale made under it before any appeal is taken and the execution of the judgment stayed is not affected by any appeal afterwards taken, though that part of the decree directing the sale to be made by a referee, instead of the sheriff, be set aside as erroneous.[7]

[1] Lannay *v.* Wilson, 30 Md. 536. See §§ **1892, 1893.**

[2] Rockwell *v.* Servant, 63 Ill. 424; Delahay *v.* McConnel, 5 Ill. 4 (Scam.) 156.

[3] Bennett *v.* Matson, 41 Ill. 332; O'Brian *v.* Fry, 82 Ill. 274; *S. C.* Ib. 87.

[4] Stephens *v.* Ill. Mut. F. Ins. Co. 43 Ill. 327; Sweezy *v.* Chandler, 11 Ill. 445; Johnson *v.* Baker, 38 Ill. 99.

[5] Stout *v.* Keyes, 2 Dougl. (Mich.) 184.

[6] Phœnix *v.* Clark, 6 N. J. Eq. (2 Halst.) 447. See §§ **684–698.**

[7] Armstrong *v.* Humphreys, 5 S. C. 128; Breese *v.* Bange, 2 E. D. Smith (N. Y.), 474; Blakeley *v.* Calder, 15 N. Y. 617; Buckmaster *v.* Jackson, 4 Ill. (3 Scam.) 104; Holden *v.* Sackett, 12 Abb. (N. Y.) Pr. 473.

The rule is the same although the purchaser was one of the parties to the suit;[1] or even if he had notice at the time of the sale that an effort would be made to obtain a reversal of the decree.[2] The law does not require a purchaser to inspect the record and to see that it is free from error. All that is required of him is to see that there is a subsisting judgment by a court having jurisdiction of the case. "If such was not the rule, no one would become a purchaser at a judicial sale, and all competition would cease, and plaintiffs would become purchasers at their own price."[3]

VIII. *The Delivery of Possession to Purchaser.*

1663. Possession delivered to purchaser. — It has long been the practice of courts of chancery in England, adopted also in this country, wherever a sale and conveyance of real estate has been decreed, to compel the person in possession of the property to surrender it to the purchaser, by an order, or by injunction, or by a writ of assistance. Lord Hardwicke said that this practice had its origin in the reign of James I.;[4] but Mr. Eden says that this statement is a mistake, as many precedents for injunctions to deliver possession after a decree, and a commission or writ of assistance to the sheriff, are in the printed reports as early as the reign of Queen Elizabeth, and also are found in a manuscript book of orders in the time of Henry VIII., Edward VI., and Mary.[5] But whenever the practice was begun, it has long been fully established both in England and in this country,[6] and is applied to sales under decrees in foreclosure suits.

Accordingly, after a sale has been made under a decree in a foreclosure suit, the court has power to give possession to the

In Gray *v.* Brignardello, 1 Wall. 627, 634, Mr. Justice Davis stated the rule to be, that "although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while the decree or judgment were in full force, and which they authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made, and authorized the sale." And see Bank of U. S. *v.* Voorhees, 1 McLean, 221.

[1] Gossom *v.* Donaldson, 18 B. Mon. (Ky.) 230.

[2] Irwin *v.* Jeffers, 3 Ohio St. 389.

[3] Fergus *v.* Woodworth, 44 Ill. 374, 384.

[4] Roberdeau *v.* Rous, 1 Atk. 543; Penn *v.* Baltimore, 1 Ves. Sen. 444.

[5] Eden on Injunctions, 261; Waterman's ed. 2d vol. 425.

[6] Dove *v.* Dove, 2 Dick. 617; *S. C.* 1 Bro. Ch. 375; Huguenin *v.* Baseley, 15 Ves. 180; Dorsey *v.* Campbell, 1 Bland (Md.), 356, 363; Garretson *v.* Cole, 1 Har. & John. (Md.) 370, 387; Buffum's case, 13 N. H. 14.

purchaser, though the delivery of possession is not made part of the decree. He is not driven to an action of ejectment at law to obtain possession.[1] But if the person in possession was not a party to the suit, and is a mere stranger who entered into possession before the suit was begun, he cannot be turned out of possession by an execution on the decree.[2] Had he come into possession *pendente lite* he would be bound by the decree in the same manner as the defendant is.[3] So long as the owner of the premises is in possession, and has the right to redeem under a prior mortgage,

[1] **Illinois**: Jackson *v.* Warren, 32 Ill. 331; Williams *v.* Waldo, 3 Scam. 264. **New York**: Suffern *v.* Johnson, 1 Paige, 450; Frelinghuysen *v.* Colden, 4 Paige, 204; Van Hook *v.* Throckmorton, 8 Paige, 33; McGown *v.* Wilkins, 1 Paige, 120; Kershaw *v.* Thompson, 4 Johns. Ch. 609; Bolles *v.* Duff, 43 N. Y. 469; Ludlow *v.* Lansing, Hopk. 231; Valentine *v.* Teller, Ib. 422. **Other States**: Skinner *v.* Beatty, 16 Cal. 156; Horn *v.* Volcano Water Co. 18 Cal. 141; Creighton *v.* Paine, 2 Ala. 138; Bright *v.* Pennywit, 21 Ark. 130; Trabue *v.* Ingles, 6 B. Mon. (Ky.) 82.

Chancellor Kent, in Kershaw *v.* Thompson, *supra*, fully examines the question of the power of a court of equity to give possession of property sold under its decree, and in his luminous opinion says: —

"It does not appear to consist with sound principle that the court which has exclusive authority to foreclose the equity of redemption of a mortgagor, and can call all the parties in interest before it and decree a sale of the mortgaged premises, should not be able even to put the purchaser into possession against one of the very parties to the suit, and who is bound by the decree. When the court has obtained lawful jurisdiction of a case, and has investigated and decided it upon its merits, it is not sufficient for the ends of justice merely to declare the right without affording the remedy. If it was to be understood that after a decree and sale of mortgaged premises, the mortgagor, or other party to the suit, or perhaps those who have been let into the possession by the mortgagor *pendente lite*, could withhold the possession in defiance of the authority of this court, and compel the purchaser to resort to a court of law, I apprehend that the delay and expense and inconvenience of such a course of proceeding would greatly impair the value and diminish the results of sales under a decree. . . . The distribution of power among the courts would be injudicious, and the administration of justice exceedingly defective, and chargeable with much useless delay and expense, if it were necessary to resort, in the first instance, to a court of equity, and afterwards to a court of law, to obtain a perfect foreclosure of a mortgage. It seems to be absurd to require the assistance of two distinct and separate jurisdictions for one and the same remedy, viz., the foreclosure and possession of the forfeited pledge. But this does not, upon due examination, appear to be the case; and it may be safely laid down as a general rule, that the power to apply the remedy is coextensive with the jurisdiction over the subject matter."

In **New Jersey** the practice is of recent adoption; but the propriety of it, and the power of the court to apply it, are fully established in the case of Schenck *v.* Conover, 13 N. J. Eq. 220.

In **New York** it is now provided by statute that where any person shall continue in possession of any real estate sold pursuant to the foreclosure of a mortgage, possession may be recovered by summary proceedings. 3 R. S. 823; Laws 1874, ch. 208.

[2] Benhard *v.* Darrow, Walker (Mich.), 519; Thompson *v.* Smith, 1 Dill. 458; Terrell *v.* Allison, 21 Wall. 289.

[3] Kessinger *v.* Whittaker, 82 Ill. 22.

a purchaser under a foreclosure sale of a subsequent mortgage cannot recover possession from him. He has the legal right to retain possession until such equity has been foreclosed and sold under the prior mortgage; and it does not matter that he is barred by the statute of limitations from bringing his suit to redeem it.[1]

The remedy for obtaining possession, when this is wrongfully withheld from the purchaser, is an order of court, which, if not obeyed, may be followed by an injunction, or if need be by a writ of assistance.[2] If the order for the delivery of possession be not included in the decree, a special order may be entered; but the writ of assistance may follow after a refusal to obey the order.[3] It will be granted also at the instance of the purchaser, or of the complainant; and it may be issued not only against the defendant, but as well against any person in possession under him, or holding by any title not paramount to the mortgage.[4] If a tenant is in possession, the deed should be shown him by the purchaser when he makes demand of possession, and upon his refusal to comply, notice of the application to court should be given.[5] As against a party to the suit the writ will be granted upon a motion *ex parte*, but it would seem that one who has come into possession *pendente lite* would be entitled to notice of the motion.[6] The writ of assistance is the only process necessary for giving possession, and should issue in the first instance without a prior injunction, upon proof of the service of the order to deliver possession and of refusal to comply with it.[7] The vendee of the pur-

[1] Wells *v.* Pierce, 3 Keyes (N. Y.), 102.

[2] **Illinois**: O'Brian *v.* Fry, 82 Ill. 87; Aldrich *v.* Sharp, 3 Scam. 261. **New York**: Kershaw *v.* Thompson, 4 Johns. Ch. 609; Van Hook *v.* Throckmorton, 8 Paige, 33; Frelinghuysen *v.* Colden, 4 Paige, 204. **California**: Montgomery *v.* Tutt, 11 Cal. 190. **South Carolina**: Trenholm *v.* Wilson, 13 S. C. 174. **Kansas**: Bird *v.* Belz, 33 Kans. 391; 6 Pac. Rep. 627. **Florida**: Gorton *v.* Paine, 18 Fla. 117.

In **South Carolina**, under the recent Code, the remedy is an order of the court, and a writ of *habere facias possessionem* is not necessary or proper. Armstrong *v.* Humphreys, 5 S. C. 128.

In **Alabama** an appeal from the order directing a writ of assistance to issue may be taken by the tenant against the purchaser, though a writ of error will also lie. Creighton *v.* Planters' & Merchants' Bank, 3 Ala. 156.

[3] O'Brian *v.* Fry, *supra;* Oglesby *v.* Pearce, 68 Ill. 220; Kessinger *v.* Whittaker, 82 Ill. 22.

[4] Schenck *v.* Conover, 13 N. J. Eq. 220; Watkins *v.* Jerman (Kans.), 13 Pac. Rep. 798; Bird *v.* Belz, *supra.*

[5] Fackler *v.* Worth, 13 N. J. Eq. 395; New York Life Ins. & Trust Co. *v.* Rand, 8 How. (N. Y.) Pr. 35, 39.

[6] Benhard *v.* Darrow, Walk. (Mich.) 519; Commonwealth *v.* Ragsdale, 2 Hen. & Mun. (Va.) 8; Lynde *v.* O'Donnell, 12 Abb. (N. Y.) Pr. 286; *S. C.* 21 How. Pr. 34.

[7] 2 Daniell's Ch. Pr. 1280; Schenck *v.* Conover, *supra;* Hart *v.* Linsday, Walk.

chaser at the sale is entitled to this remedy against the mortgagor in possession;[1] and the assignee of the purchaser's bid may also have it.[2]

1664. Possession will be given to the purchaser not only as against all the parties to the suit, but also as against any persons who have come into possession under them pending the suit.[3] But possession acquired by any one after the purchaser has received his deed and conveyed the premises to another will not be interfered with. Neither is one who enters fifteen months after the sale deemed as having entered pending the suit, and therefore he cannot be removed by a writ of assistance, though he entered under a party to the suit.[4] Though one enter pending the suit, if he did not enter under a party to the suit, or under any one who had derived title to the premises, or had gone into possession of them under a party pending the suit, he cannot be turned out of possession under the decree;[5] as, for instance, if he purchased after the commencement of the suit, at a sale under a judgment against the mortgagor recovered before that time.[6]

1665. If the person in possession shows a right paramount to the mortgage, of course the court will not attempt to decide any question of legal title, and the possession must then be sought for by proceedings at law.[7] Such would be the case when the party in possession claims under a lease made before the mortgage under which the sale has been made.[8] If the purchaser allows the mortgagor to remain in possession under an agreement to redeem, he is after that in possession under this contract, and not as defendant in the foreclosure suit; and therefore he cannot

(Mich.) 144; Valentine *v.* Teller, Hopk. (N. Y.) 422; Ballinger *v.* Waller, 9 B. Mon. (Ky.) 67.

[1] McLane *v.* Piaggio (Fla.), 3 So. Rep. 823; Ketchum *v.* Robinson, 48 Mich. 618; 12 N. W. Rep. 877.

[2] Ekings *v.* Murray, 29 N. J. Eq. 388; Keil *v.* West, 21 Fla. 508.

[3] Bell *v.* Birdsall, 19 How. (N. Y.) Pr. 491; Kessinger *v.* Whittaker, 82 Ill. 22. If, however, the interest of the mortgagor which is the subject of foreclosure and sale is merely the net income in land, without any interest in or title to the land itself, the title and the right of possession being vested in trustees, a direction to put the purchaser in possession is not proper. There should be in such case an order that the trustee apply the net income to the payment of the mortgage debt. Wilson *v.* Russ, 17 Fla. 691.

[4] Betts *v.* Birdsall, 11 Abb. (N. Y.) Pr. 222; *S. C.* 19 How. Pr. 491.

[5] Van Hook *v.* Throckmorton, 8 Paige (N. Y.), 33.

[6] Frelinghuysen *v.* Colden, 4 Paige (N. Y.), 204.

[7] Wade *v.* Miller, 32 N. J. L. 296; Kirkpatrick *v.* Corning, 38 N. J. Eq. 234; Chadwick *v.* Island Beach Co. (N. J.) 8 Atl. Rep. 650.

[8] Thomas *v.* De Baum, 14 N. J. Eq. 37.

be removed under a writ of assistance.[1] The exercise of the power of the court to deliver possession in any case rests in the sound discretion of the court, and in cases of doubtful right the possession will be left to legal adjudication.[2]

Where a wife is a necessary party to a foreclosure suit by reason of a prior homestead right, but has not been joined with her husband as a defendant, and she is in possession of the mortgaged premises with her husband, a purchaser at the foreclosure sale will not be entitled to a writ of assistance against the husband.[3] But the fact that the wife is entitled to one third of the proceeds arising from the sale does not defeat the purchaser's right of possession.[4]

1666. Until the purchaser has complied with the terms of sale,[5] and a deed has been executed to him by the selling officer, and confirmed by the court, he is not entitled to an order of court to be let into possession.[6] He is not entitled to a deed until he has paid the whole of the purchase money. Even if the purchaser be a junior mortgagee, and is entitled to a portion of the surplus money, he will be required to pay in the whole of it, especially if there are other incumbrancers who might, perhaps, have claims upon the surplus superior to his.[7]

The purchaser before obtaining a deed cannot maintain an action of forcible detainer against the party in possession; and a judgment against the purchaser in such suit is no bar to an application by him for a writ of assistance to put him in possession.[8]

As already noticed, a purchaser is not generally entitled to the rents until he receives a deed of the property; but after this has been delivered to him, and he has demanded possession under it, he is entitled to the accruing rents.[9] If he is put into possession of the land immediately upon the sale and before the payment of

[1] Toll *v.* Hiller, 11 Paige (N. Y.), 228.

[2] McKomb *v.* Kankey, 1 Bland (Md.), 363, note c; Thomas *v.* De Baum, 14 N. J. Eq. 37.

[3] Hefner *v.* Urton (Cal.), 12 Pac. Rep. 486.

[4] Dill *v.* Vincent, 78 Ind. 321.

[5] Armstrong *v.* Humphreys, 5 S. C. 128.

[6] Clason *v.* Corley, 5 Sandf. (N. Y.) 447; Bennett *v.* Matson, 41 Ill. 332; Myers *v.* Manny, 63 Ill. 211; Howard *v.* Bond, 42 Mich. 131. In Wisconsin, by rule of court (1857), the purchaser was entitled to be let into possession before confirmation of the sale. Loomis *v.* Wheeler, 18 Wis. 524.

[7] Battershall *v.* Davis, 23 How. (N. Y.) Pr. 383.

[8] Cochran *v.* Fogler, 116 Ill. 194.

[9] Castleman *v.* Belt, 2 B. Mon. (Ky.) 157; Clason *v.* Corley, *supra*.

the purchase money, he is chargeable with interest upon this to the time of payment.[1]

A purchaser may, upon petition pending confirmation of the sale, obtain an injunction against the mortgagor restraining him from committing waste.[2]

1667. These summary proceedings do not preclude remedy by suit at law.[3] In such case the plaintiff must in the first place show a valid foreclosure.[4] The validity and execution of the mortgage cannot, however, be inquired into.[5] The decree in the foreclosure suit, and the sale under it, are conclusive if regular; and, therefore, a mortgagor cannot defend the action on the ground that the premises are his homestead; that defence is available only in the foreclosure suit.[6]

IX. *Setting aside of Sale.*

1668. A sale under a decree of foreclosure may be set aside by a bill in equity brought for the purpose, when the sale has been fraudulently conducted to the prejudice of the plaintiff, even when he might have a remedy by motion in the original suit.[7] He then has a legal and absolute right independent of the discretion of the court.[8] When the rights of third persons have accrued, some original proceeding is necessary in which these rights may be tried in the ordinary way: they cannot be adjudicated in a summary manner upon motion.[9] They must in some way be brought into court, and given an opportunity to be heard.[10] But ordinarily, if there is nothing to prevent an application in the original suit, an original bill for this purpose cannot be sustained;[11] and when the proceedings are regular and free from fraud, and the party is only equitably entitled to relief, his only remedy is by motion in the foreclosure suit, addressed to the discretion of the court, to open the biddings or set aside the sale.[12]

[1] Haven *v.* Grand Junc. R. R. & Depot Co. 109 Mass. 88.

[2] Mutual L. Ins. Co. *v.* Bigler, 79 N. Y. 568.

[3] Kessinger *v.* Whittaker, 82 Ill. 22; Cook *v.* Wiles, 42 Mich. 439.

[4] Dwight *v.* Phillips, 48 Barb. (N. Y.) 116. See Heyman *v.* Babcock, 30 Cal. 367.

[5] Hayes *v.* Shattuck, 21 Cal. 51.

[6] Haynes *v.* Meek, 14 Iowa, 320.

[7] Vandercook *v.* Cohoes Sav. Inst. 5 Hun (N. Y.), 641; McMurray *v.* McMurray, 66 N. Y. 175; McWilliams *v* Withington (C. C. Nev. 1881), 7 Fed. Rep. 326; Sanger *v.* Nightingale, 7 Sup. Ct. Rep. 1109; Tucker *v.* Jackson, 60 N. H. 214.

[8] See Gould *v.* Mortimer, 26 How. (N. Y.) Pr. 167.

[9] Crawford *v.* Tuller, 35 Mich. 57.

[10] Jewett *v.* Morris, 41 Mich. 689.

[11] Brown *v.* Frost, 10 Paige (N. Y.), 243; Sked *v.* Sedgley, 36 Ohio St. 483.

[12] **New York:** McCotter *v.* Jay, 30 N. Y.

In allowing him to come in, the court may impose such terms as may seem proper. This application may be made by any one injured by the proceedings under the decree, although he is not a party to the suit.[1]

The sale may be set aside by an order in the original suit, even after the deed has been delivered, either for impropriety in the sale, or for the purpose of letting in a defence to the action.[2]

The motion for resale, when founded on facts not apparent upon the record, should properly be heard and determined upon affidavit.[3]

The purchaser under the sale sought to be set aside should be made a party to the bill, or should be notified of the motion made for that purpose. Third persons who have bought of the first purchaser should in like manner have an opportunity to be heard.[4]

Allegations of fraud in procuring the mortgage, and allegations of the payment of it, will not support an action against the purchaser to set aside the foreclosure sale, when no fraud or *mala fides* on the part of the purchaser is alleged.[5] Such questions are necessarily involved in the proceedings leading to the judgment, and, whether actually raised or not, are concluded by the judgment.

After a confirmation of the sale and final decree, an application to set aside the sale, decree of confirmation and final decree, reasons founded on irregularities in making the sale are not available, unless a sufficient excuse is shown for failure to present such reasons in opposition to the application to confirm the sale.[6]

In general it may be said that objections to a sale based upon errors in the proceedings or in the decree will not be considered.[7]

1669. An application for a resale can be made only by some one who is either interested in the mortgaged premises, or is under personal liability for a deficiency.[8] A sale will not be set

80; Smith *v.* Am. Life Ins. & Trust Co. Clarke, 307; White *v.* Coulter, 1 Hun, 357.

[1] **New York**: Gould *v.* Mortimer, 26 How. Pr. 167; Am. Ins. Co. *v.* Oakley, 9 Paige, 259; Brown *v.* Frost, 10 Paige, 243; Nicholl *v.* Nicholl, 8 Paige, 349.

[2] Mut. Life Ins. Co. *v.* Sturges, 33 N. J. Eq. 328.

[3] Savery *v.* Sypher, 6 Wall. 157.

[4] Lawrence *v.* Jarvis, 36 Mich. 281; Crawford *v.* Tuller, 35 Mich. 57.

[5] Ruff *v.* Doty (S. C.), 1 S. E. Rep. 707.

[6] Colcs *v.* Yorks (Minn.), 31 N. W. Rep. 353; Smith *v.* Valentine, 19 Minn. 452; Dodge *v.* Allis, 27 Minn. 376; Marsh *v.* Sheriff (Md.), 14 Atl. Rep. 664.

[7] Meyer *v.* Utah & Pleasant Val. Ry. Co. 3 Utah 280.

[8] **New York**: Bodine *v.* Edwards, 3 Ch. Dec. 46; *S. C.* 2 N. Y. Leg. Obs. 231; Gould *v.* Mortimer, *supra;* May *v.* May, 11 Paige, 201.

aside at the instance of one who was not a party to the suit, when he was not made a party through his own negligence in having his deed recorded, and his grantor, who appeared by the record to be the owner of the property when the suit was brought, was properly made a defendant.[1] If the applicant be a subsequent mortgagee who holds his mortgage only as collateral security for the debt of a third person, he should on equitable grounds be required to exhaust his remedy against the principal debtor before he can have the sale set aside.[2] It must be made without delay; though relief has been granted even after two or three years, when the purchaser had not parted with his title, and there was a reasonable excuse for the delay.[3]

A wife having only an inchoate right of dower in the premises cannot sustain an application made in the lifetime of her husband to set aside a foreclosure sale, or the decree of sale, on the ground that she was not made a party to the suit, or was not properly served with summons.[4] If, instead of applying for a resale, the party interested agrees with the purchaser for a future redemption of the premises, and for the possession in the mean time, the court will not afterwards set aside the sale.[5]

If no one applies for a resale, and all parties are content that the sale shall stand, and justice can be done without it, the court will not order a resale of its own motion.[6]

1670. After confirmation of the sale, it will not be set aside on account of inadequacy of price, unless it be also shown that the sale was unfairly conducted, or there was fraud or surprise or mistake, which prevented the obtaining of any adequate price,[7]

[1] § 1412; Leonard *v.* N. Y. Bay Co. 28 N. J. Eq. 192.

[2] **New York**: Soule *v.* Ludlow, 3 Hun, 503; *S. C.* 6 Thomp. & C. 24; Depew *v.* Dewey, 2 T. & C. 515; *S. C.* 46 How. Pr. 441.

[3] Fergus *v.* Woodworth, 44 Ill. 374; Nicholl *v.* Nicholl, 8 Paige (N. Y.), 349.

[4] White *v.* Coulter, 1 Hun (N. Y.), 357. See, however, Cain *v.* Gimon, 36 Ala. 168.

[5] Toll *v.* Hiller, 11 Paige (N. Y.), 228.

[6] Eleventh Ward Sav. Bank *v.* Hay, 55 How. (N. Y.) Pr. 444.

[7] **New York**: Am. Ins. Co. *v.* Oakley, 9 Paige, 259; Tripp *v.* Cook, 26 Wend. 143; Whitbeck *v.* Rowe, 25 How. Pr. 403; Kellogg *v.* Howell, 62 Barb. 280; Thompson *v.* Mount, 1 Barb. Ch. 607; Gould *v.* Libby, 24 How. Pr. 440; Lefevre *v.* Laraway, 22 Barb. 167; Eleventh Ward Sav. Bank *v.* Hay, *supra.* **Wisconsin**: Strong *v.* Catton, 1 Wis. 471; Hill *v.* Hoover, 5 Wis. 354; Warren *v.* Foreman, 19 Wis. 35. **Alabama**: Mahone *v.* Williams, 39 Ala. 202; Littell *v.* Zuntz, 2 Ala. 256. **Tennessee**: Henderson *v.* Lowry, 5 Yerg. 240. **Ohio**: West *v.* Davis, 4 McLean, 241. **Indiana**: Benton *v.* Shreeve, 4 Ind. 66. **New Jersey**: Boyd *v.* Hudson City Academical Soc. 24 N. J. Eq. 349; Twining *v.* Neil, 38 N. J. Eq. 470. **Maryland**: Marsh *v.* Sheriff (Md.), 14 Atl. Rep. 664. **Kansas**: Babcock *v.* Canfield, 36 Kans. 437.

In Kneeland *v.* Smith, 13 Wis. 591, the

or the party had no notice of the order of sale, or of the confirmation thereof.[1] The fact that a higher price may reasonably be expected on a resale is by itself no ground for granting it.[2] Although the inadequacy of price be such as to afford ground for setting aside the sale, this will not be done unless it be shown that a larger price will probably be obtained by a resale.[3] Any unfairness or misrepresentation on the part of the purchaser, by which a person interested in the property is prevented from attending the sale and bidding, and the purchaser obtains the property at a price considerably below its actual value, is a good ground for setting the sale aside.[4] Thus a resale was ordered where, upon the foreclosure of a first mortgage for $10,000, property worth $14,000 was sold to the first mortgagee for the amount of his mortgage, and the second mortgagee alleged that he refrained from bidding on account of the representations of the first mortgagee, and also of a third person, as to the amount each would bid for the property. The petitioner was required to give security to obtain a bid of $13,000, and to reimburse the purchaser for actual betterments made and taxes paid since the sale, with interest, before applying any of the proceeds of the sale to the second mortgage.[5] A similar order was made in a case where property worth $12,000 or more was sold for less than $2,500.[6]

A misapprehension on the part of a bidder as to statements made by the mortgagor at the time of the sale whereby he ceased to bid, and the premises were sold for much less than the bidder would have paid, is ground for setting aside the sale.[7] So also is a misunderstanding on the part of a second mortgagee in making

court refused to set aside a sale fairly made and confirmed, on a mere offer to bid $8,000, where the former bid was $7,601; and so in Allis *v.* Sabin, 17 Wis. 626, where there was an offer to bid $2,400, on a resale of premises, which at the former sale were bid in for $2,000; and in Northrop *v.* Cooper, 23 Kans. 432, where the sale was fair and the property brought only $100, the court refused to set aside the sale although it appeared that its actual value was from $565 to $933.

[1] Nugent *v.* Nugent, 54 Mich. 557.

[2] King *v.* Platt, 37 N. Y. 155; Kellogg *v.* Howell, 62 Barb. 280.

[3] Farmers' Bank *v.* Quick (Mich.), 39 N. W. Rep. 752.

[4] Murdock *v.* Empie, 9 Abb. (N. Y.) Pr. 283. The conditions imposed in this case were the return of the deposit and the payment of the expenses, including the auctioneer's fees, and $100 for fees in examining the title; and furthermore the giving of a bond with sureties to bid a certain sum at the resale, and to pay the expenses of it. And see Hubbard *v.* Taylor, 49 Wis. 68; Van Dyke *v.* Van Dyke, 31 N. J. Eq. 176.

[5] Dawson *v.* Drake, 29 N. J. Eq. 383.

[6] Gilbert *v.* Haire, 43 Mich. 283.

[7] Banta *v.* Brown, 32 N. J. Eq. 41.

his bid subject to the first mortgage, whereby property worth $2,500 was sold for $25.[1]

A resale should not be granted on the ground of inadequacy of price when the property, which was not worth on the day of sale more than $40,000, was bid in by the mortgagee for $35,000, the mortgagor having notice that he would not bid above that sum.[2]

After a foreclosure sale the only relief for one who claims that the sale was for an indequate price, is an application to have the sale set aside. If the mortgagee has bought the property a suit cannot be maintained against him for the recovery of the difference between the price paid and the actual value.[3]

1671. When the complainant himself becomes the purchaser, the court is always more ready to open a sale than where the property has been purchased by a stranger to the suit for the purpose of investment; the sale is set aside upon less evidence of fraud, surprise, or accident, or of the invalidating circumstance, whatever it may be.[4]

1672. Neglect of officer selling. — The parties interested in the property have a right to expect that it will be sold in the usual manner, and in a way to produce a fair competition at the sale. They will not be relieved against their own negligence, however inadequate may be the price obtained, unless it be so great as to show fraud or unfairness in the sale. But relief may be had if the property was sacrificed by the neglect or mistake of the master or officer conducting the sale,[5] as, for instance, in selling the whole premises together, when he should have sold in separate parcels.[6] The fact that a sale was made in the city of New York upon the day of the charter election, though not for that reason void, yet, taken in connection with the circumstances that a party interested in obtaining the best price possible for the property objected to the sale on that day, and made reasonable requests for a postponement, and for a sale in a particular man-

[1] Van Arsdalen *v.* Vail, 32 N. J. Eq. 189.

[2] White *v.* Coulter, 1 Hun (N. Y.), 357.

[3] Leavitt *v.* Files (Kans.), 15 Pac. Rep. 891.

[4] **New York**: Tripp *v.* Cook, 26 Wend. 143; Gould *v.* Libby, 24 How. Pr. 440; Kellogg *v.* Howell, 62 Barb. 280; Mott *v.* Walkley, 3 Edw. 590; Cain *v.* Gimon, 36 Ala. 168; Nugent *v.* Nugent, 54 Mich. 557.

[5] Marsh *v.* Ridgway, 18 Abb. (N. Y.) Pr. 262; Griffith *v.* Hadley, 10 Bosw. (N. Y.) 587; Minnesota Co. *v.* St. Paul Co. 2 Wall. 609.

[6] **New York**: Am. Ins. Co. *v.* Oakley, 9 Paige, 259; Wolcott *v.* Schenck, 23 How. Pr. 385. See Whitbeck *v.* Rowe, 25 How. Pr. 403.

ner, was held to justify the court in setting aside the sale and ordering the premises sold again.[1]

If a master has violated his instructions limiting the price of the property, of which the purchaser had notice, the sale will be set aside.[2] So if a referee sell on terms not authorized by the decree, a resale will be ordered;[3] or if the master give the impression to parties in interest that the sale will not take place, and they in consequence do not attend;[4] or if a commissioner appointed to make the sale does not pursue the instructions of the court in respect to advertising the sale;[5] or if a receiver sells several distinct parcels of land, greatly exceeding in value the debt, in one mass, to the prejudice of the debtor;[6] or if the officer requires payment of the whole amount of the purchase money within an hour after the sale;[7] or if he sell a lot not equitably liable for the debt.[8]

But the neglect of a master to give to a person interested in the foreclosure actual personal notice of the day of sale, in accordance with a promise to do so, is not such an official delinquency as would justify setting aside the sale.[9]

The owner was allowed to redeem where the sale was made contrary to the sheriff's assurance that it would be adjourned.[10]

1673. Upon an application for a resale the rights of the purchaser will be taken into account, and will prevail when the sale has been fair and free from fraud, or other circumstances, which give an undoubted right to have it set aside.[11] There must be a good reason for disturbing the sale; and when there is no legal right to relief, and the application is addressed merely to the discretion of the court, the court will consider the equities of all the parties, to the end of giving substantial justice.[12]

[1] King *v.* Platt, 37 N. Y. 155; *S. C.* 35 How. Pr. 23; 3 Abb. Pr. N. S. 434.

[2] Requa *v.* Rea, 2 Paige (N. Y.), 339. The limit of price was $2,600 and the master sold for $1,000.

[3] Hotchkiss *v.* Clifton Air Cure, 4 Keyes (N. Y.), 170; Koch *v.* Purcell, 45 N. Y. Superior Ct. 162.

[4] Collier *v.* Whipple, 13 Wend. (N. Y.) 224.

[5] Vanbussum *v.* Maloney, 2 Metc. (Ky.) 550; Denning *v.* Smith, 3 Johns. (N. Y.) Ch. 332.

[6] Griffith *v.* Hadley, 10 Bosw. (N. Y.) 587; and see Wolcott *v.* Schenck, 23 How. (N. Y.) Pr. 385; Arnold *v.* Gaff, 58 Ind. 543.

[7] Goldsmith *v.* Osborne, 1 Edw. (N. Y.) 560.

[8] Breese *v.* Busby, 13 How. (N. Y.) Pr. 485.

[9] Crumpton *v.* Baldwin, 42 Ill. 165.

[10] Nevius *v.* Egbert, 31 N. J. Eq. 460.

[11] Gardiner *v.* Schermerhorn, Clarke (N. Y.), 101.

[12] Wiley *v.* Angel, Clarke (N. Y.), 217; Tripp *v.* Cook, 26 Wend. (N. Y.) 143; Cole *v.* Miller, 60 Ind. 463.

It is no good cause for setting aside a foreclosure sale that it was advertised in a newspaper of small circulation;[1] nor that the master has failed to report the sale at the next term of the court;[2] nor that the judgment was entered for too large an amount,[3] for the court cannot inquire whether the judgment was too large or too small, or investigate the proceedings in the suit prior to the decree, upon an application to set aside a foreclosure sale;[4] nor that the original mortgagee, who had assigned the mortgage and guaranteed the payment of it, but was a party to the foreclosure suit, did not know of the time and place of sale, for he was bound to use due diligence in obtaining this information, if he wished to protect his interests;[5] nor that a party to the suit was too blind to read the newspapers and had no notice of the sale, and the property sold for much less than its value.[6]

A sale should not be set aside on account of a mere irregularity in the sale, as in selling the homestead, together with other premises, without inquiring whether the other lands cannot first be sold separately, unless it be shown that injury was done by such irregularity.[7] A sale on a decree of foreclosure cannot be impeached collaterally for any irregularity in the proceedings;[8] or because the decree was prematurely entered;[9] or because the mortgage was not duly executed.[10]

1674. Waived by delay. — Any irregularity in a sale which renders it voidable will be deemed to be waived if it is not taken advantage of within a reasonable time and before innocent parties acquire rights.[11] After a delay of seven or eight years, the court declined to inquire whether the price bid was adequate, or whether the property should have been sold in smaller quantities.[12] After a delay beyond the period prescribed by statute,

[1] Wake *v.* Hart, 12 How. (N. Y.) Pr. 444.

[2] Walker *v.* Schum, 42 Ill. 462.

[3] Young *v.* Bloomer, 22 How. (N. Y.) Pr. 383.

[4] Bullard *v.* Green. 10 Mich. 268.

[5] McCotter *v.* Jay, 30 N. Y. 80.

[6] Parkhurst *v.* Cory, 11 N. J. Eq. (3 Stockt.) 233.

[7] Lloyd *v.* Frank, 30 Wis. 306.

[8] Nagle *v.* Macy, 8 Cal. 426.

[9] Alderson *v.* Bell, 9 Cal. 315.

[10] Hayes *v.* Shattuck, 21 Cal. 51.

[11] Rigney *v.* Small, 60 Ill. 416. In this case the mortgagor waited nine years before bringing his bill to redeem. In Hamilton *v.* Lubukee, 51 Ill. 415, it was held that a mortgagor, after delaying four years from the time he had knowledge of the sale and proceedings under it, could not redeem as against remote purchasers, on the ground of defective notice of the sale and inadequacy of price. See McMurray *v.* McMurray, 66 N. Y. 175; Barnard *v.* Wilson, 66 Cal. 251.

[12] Roberts *v.* Fleming, 53 Ill. 196.

within which an action to redeem the mortgage can be brought, the court has no power to set aside the sale.[1]

A mortgagor, by inducing a person to purchase the certificate under a foreclosure sale, upon the representation that he had no title to the premises, the time of redemption having expired, is thereby estopped from afterwards questioning the regularity of the foreclosure and sale, as against such purchaser.[2]

A foreclosure sale will not be set aside at the instance of the mortgagor, for the reason that there was an understanding between him and the purchaser in fraud of third persons, that the mortgagor might redeem from the sale.[3]

1675. When mistake or accident on the part of any one interested in the property is relied upon as a ground for setting aside a sale, it must be shown that the consequence of it was that the property sold for a less price than it would otherwise have sold for, and that a material advance may be expected on a resale.[4] Particular emphasis is placed in such cases upon the amount of the advance that can be obtained, the sale having been fairly conducted.[5] When the principal defendants were prevented by unavoidable accident from reaching the place of sale until after it had been concluded, the court, in granting a resale, imposed as terms the deposit of the amount proposed to be bid, and the payment of the costs of the former sale.[6]

A mistake in the proceedings, such, for instance, as a misdescription in the bill of the land mortgaged, when first discovered after decree and sale, is ground for setting aside the decree and sale either wholly or as to the land erroneously described, and for maintaining a bill of review to correct the error.

A sale may be set aside on the ground of surprise; and this relief was granted in a case where the defendant was a German woman, who understood little English, and did not understand the nature of the proceedings against her. She lived upon the property, and thought that if the house was to be sold a notice of sale would be posted on the house. She did not know of the decree or of the sale until the property had been sold, when she

[1] Depew *v.* Dewey, 46 How. (N. Y.) Pr. 441.

[2] Curyea *v.* Berry, 84 Ill. 600.

[3] Randall *v.* Howard, 2 Black, 585.

[4] Stryker *v.* Storm, 1 Abb. (N. Y.) Pr. N. S. 424. See, also, Hey *v.* Schooley, 7 Ohio, Part II. 49.

[5] Hudgins *v.* Lanier, 23 Gratt. (Va.) 494. For cases in which the court refused to set aside a sale for surprise, see Hunt *v.* Ellison, 32 Ala. 173; Hill *v.* Hoover, 5 Wis. 354.

[6] Adams *v.* Haskell, 10 Wis. 123.

tendered to the sheriff the amount of the execution, with costs, and alleged in her petition that she stood ready to pay the same at any time.[1]

A sale may be set aside upon the application of the mortgagee, on the ground of a mistake whereby the land was sold at a grossly inadequate price; as where a mortgagee instructed an agent to attend the sale and bid the amount of the mortgage, and through his mistake or inadvertence he failed to do so, and the land was sold for a small part of the amount of the mortgage debt.[2]

1676. A sale will not be set aside without some pressing reason. If the mortgagor is competent to take care of his interests, and has the opportunity of attending the sale, and this is fairly conducted, the court will not interfere.[3] A resale will not be granted, even at the instance of infant defendants, on account of the failure of their guardian to attend the sale, unless it appears that their share of the proceeds, after indemnifying the purchaser at the first sale, will be materially increased by a sale fairly conducted in all respects.[4] A resale will not be ordered in favor of a party to the suit who has been negligent or inattentive, and made no inquiry in relation to the sale, or the time of it.[5] But if a mortgagor is prevented, without negligence on his part, from taking care of his interests, as by his illness, which the purchaser took advantage of by preventing a postponement of the sale and purchasing for one third of the real value;[6] or being absent from the state, his agent in charge of the property became insane;[7] or having appealed from the decree and supposing the sale was stayed, the plaintiff without his knowledge proceeds to sell;[8] or a subsequent incumbrancer is prevented from attending the sale by accident, and the premises are sold for an inadequate price, — in all these cases the sale will be set aside.[9]

If the mortgagor or others interested in the property have been

[1] Schulling *v.* Lintner (N. J.), 11 Atl. Rep. 153.

[2] Cole Co. *v.* Madden (Mo.), 4 S. W. Rep. 397.

[3] Haines *v.* Taylor, 3 How. (N. Y.) Pr. 206.

[4] Stryker *v.* Storm, 1 Abb. (N. Y.) Pr. N. S. 424. The guardian was kept from the sale by delay of the railway train by which he was to go to the place of sale.

[5] Francis *v.* Church, Clarke (N. Y.), 475.

[6] May *v.* May, 11 Paige (N. Y.), 201; Billington *v.* Forbes, 10 Paige (N. Y.), 487; Carpenter *v.* Smith, 30 N. J. Eq. 463.

[7] Thompson *v.* Mount, 1 Barb. (N. Y.) Ch. 607.

[8] Gould *v.* Libby, 24 How. (N. Y.) Pr. 440; *S. C.* 18 Abb. Pr. 32.

[9] Howell *v.* Hester, 4 N. J. Eq. (3 Green) 266.

misled by the mortgagee, or even by a third person, in reference to the foreclosure, and in consequence did not attend the sale, and the property was bought by the mortgagee for a price greatly less than its value, a resale will be granted.[1] The petitioner may properly be required to guarantee a bid of a certain sum at the resale.[2] A resale was granted where a party to the suit persuaded the plaintiff to withdraw his consent to a postponement of the sale, knowing that the mortgagor was sick and unable to attend, and himself became the purchaser at a price wholly inadequate.[3] A sale will be set aside whenever the debtor has been misled in any way by the mortgagee or the purchaser, and thereby prevented from protecting his interests at the sale, and the property has been sold greatly below its value.[4]

1677. Few bidders. — It is no good cause for setting aside a judicial sale, that only a few bidders were present. If the terms of the decree have been pursued, and the property sold for an adequate price, the sale must stand. But a sale at which no bidders were present except the auctioneer, who bid in the property for the mortgagee, was held void.[5] And so without determining whether the price obtained at a sale was adequate, the court set it aside on its appearing that only one bidder was present, and that others intending to be present and to bid for a part of the land were deterred from doing so by the inclemency of the weather.[6]

1678. When a foreclosure sale is invalid by reason that in making it the requirements of statute have not been followed, the purchaser is subrogated to the rights of the mortgagee. When the proper parties to the suit are omitted, and therefore are not bound by it, or there is any other irregularity in the proceedings, the sale operates as a voluntary assignment by the mortgagee of his interest to the purchaser.[7] This is true of sales under pow-

[1] Campbell *v.* Gardner, 11 N. J. Eq. (3 Stockt.) 423.

[2] Hazard *v.* Hodges, 17 N. J. Eq. 123.

[3] Billington *v.* Forbes, 10 Paige (N. Y.), 487.

[4] Collier *v.* Whipple, 13 Wend. (N. Y.) 224, 226; Hoppock *v.* Conklin, 4 Sandf. (N. Y.) Ch. 582.

[5] Campbell *v.* Swan, 48 Barb. (N. Y.) 109.

[6] Roberts *v.* Roberts, 13 Gratt. (Va.) 639.

[7] Robinson *v.* Ryan, 25 N. Y. 320; Grapengether *v.* Fejervary, 9 Iowa, 163; Honaker *v.* Shough, 55 Mo. 472; Stoney *v.* Shultz, 1 Hill (S. C.) Eq. 405; Cheek *v.* Waldrum, 25 Ala. 152; Stark *v.* Brown, 12 Wis. 572; Moore *v.* Cord, 14 Wis. 213; Childs *v.* Childs, 10 Ohio St. 339; Frische *v.* Kramer, 16 Ohio, 125; Nims *v.* Sherman, 43 Mich. 45.

ers of sale,[1] as well as those under decrees of court. Such purchaser also acquires the mortgagee's rights to recover from the mortgagor, or others personally liable for the debt, any deficiency there may be after the application of the proceeds of the property.[2] In such cases the purchaser may use his mortgage title to protect himself in the possession of the property if he has obtained this;[3] the mortgagor cannot maintain ejectment against him any more than he could against the mortgagee lawfully in possession after condition broken.[4] Moreover, he may maintain ejectment on the mortgagee's legal title, where the mortgagee himself could maintain the action.[5] The purchaser's title under an invalid sale is good against all except the mortgagor and those claiming under him.[6]

1679. A second action to foreclose. — If the owner of the equity has, through mistake, not been made a party, the mortgagee who has purchased at the sale may maintain a second action to foreclose the equity of such owner, and for a new sale,[7] but he cannot recover the costs of the previous sale.[8] The foreclosure is valid as against those who were made parties to the proceeding; and if the error was in not making a junior mortgagee a party, the purchaser acquires an estate subject only to the lien of the junior mortgagee,[9] and the purchaser may maintain proceedings to foreclose such lien.[10] By the act of purchase he submits himself to the jurisdiction of the court in the foreclosure suit as to all matters connected with the sale, and he is entitled to apply for relief such as the facts may justify. He may, by a supplemental bill, bring in all persons interested in the premises whose rights are not already foreclosed; or if necessary, he may have the sale set aside and obtain a resale of the

[1] Grosvenor *v.* Day, Clarke (N. Y.), 109; Jackson *v.* Bowen. 7 Cow. (N. Y.) 13; Gilbert *v.* Cooley, Walk. (Mich.) 494. See chapter XL.

[2] Robinson *v.* Ryan, 25 N. Y. 320.

In a late case in Missouri, however, it is held that the irregular sale does not operate to assign the debt itself. Wells *v.* Lincoln County, 80 Mo. 424, explaining Honaker *v.* Shough, 55 Mo. 472.

[3] Honaker *v.* Shough, *supra;* Jones *v.* Mack, 53 Mo. 147; Jackson *v.* Magruder, 51 Mo. 55.

[4] Gillett *v.* Eaton, 6 Wis. 30; Tallman *v.* Ely, 6 Wis. 244.

[5] Georgia Pacific R. R. Co. *v.* Walker, 61 Miss. 481.

[6] Casler *v.* Shipman, 35 N. Y. 533.

[7] Georgia Pacific R. R. Co. *v.* Walker, *supra.*

[8] State Bank of Wisconsin *v.* Abbott, 20 Wis. 570; and see Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212; Shirk *v.* Andrews, 92 Ind. 509, quoting text.

[9] Carpentier *v.* Brenham, 40 Cal. 221.

[10] Goodenow *v.* Ewer, 16 Cal. 461.

premises; or the court may give such other relief as justice demands.[1]

Although a new action is the proper remedy for a foreclosure imperfect through failure to make all persons interested in the equity of redemption parties to the suit, the courts have allowed the original suit to be reinstated upon an amended petition, even after an interval of several years.[2]

1680. Redemption in such case can only be effected by satisfying the prior mortgage. It is not sufficient to pay the amount for which the property was bid off at the sale, where this amount is less than the mortgage debt; and this rule applies as well in those states where a mortgage is regarded as a mere lien, as where the common law doctrine still prevails that the mortgage is the legal estate. Although the mortgage be regarded only as a lien for enforcing the debt, the mortgagee is just as much entitled to payment, and his lien is not merged or lost in the judgment of foreclosure and sale.[3]

If before the sale is set aside the purchaser has sold the property or any part of it to another, who has taken it in good faith, for value, and without notice, such sale will not be affected by the action of the court and the resale under its authority. But the court will inquire into the circumstances of the purchaser's sale, and if any collusion be found, or any facts from which notice should be inferred, the title will be made void as effectually as if it had been retained in the first purchaser.[4] Judgments against the first purchaser after the delivery of the deed to him, being merely liens upon his interest, cease to incumber it on the sale being set aside.[5]

Intervening purchasers and mortgagees may be protected by providing that the money received from the resale of the property shall be held and not distributed, until the further order of the court, to the end that it may be applied so far as necessary to the repayment of the moneys advanced by them in good faith on the property.[6]

One who has purchased of the vendee at the foreclosure sale,

[1] Boggs *v.* Hargrave, 16 Cal. 559; Goodenow *v.* Ewer, 16 Cal. 461.

[2] Loftin *v.* Strow (Ky.), 4 S. W. Rep. 180.

[3] Johnson *v.* Harmon, 19 Iowa, 56; Knowles *v.* Rablin, 20 Iowa, 101; Street *v.* Beal, 16 Iowa, 68; Massie *v.* Wilson, 16 Iowa, 390; Douglass *v.* Bishop, 27 Iowa, 214.

[4] Colby *v.* Rowley, 4 Abb. (N. Y.) Pr. 361.

[5] Colby *v.* Rowley, *supra.*

[6] Gould *v.* Libby, 18 Abb. (N. Y.) Pr. 32; *S. C.* 24 How. Pr. 440.

during the pendency of a motion to set the sale aside, is not entitled to protection.[1]

1681. When a sale is set aside by order of court the title of the purchaser is vacated,[2] and the mortgage is restored to the same position it occupied before the proceedings were commenced, without any affirmative judgment of the court. The satisfaction of the mortgage debt caused by the sale is also vacated.[3] The mortgage cannot be deemed to be paid, or the lien upon the premises in any way impaired.[4] The purchaser also is entitled to be put into the same situation he was before the purchase.[5] If the sale be set aside, a purchaser who has entered into possession is held to account for the rents and profits received by him while in possession, for the benefit of the mortgagor or owner of the equity.[6] In like manner, in case a person interested in the property was not made a party to the suit, and consequently redeems it after the sale, the purchaser becomes liable to account for the rents and profits; and he is under the same liability in case he forecloses the outstanding incumbrance by another suit. He acquires by the sale in such case only the rights of a mortgagee in possession.[7]

[1] Quaw *v.* Lameraux, 36 Wis. 626.

[2] Freeman *v.* Munns, 15 Abb. (N. Y.) Pr. 468.

[3] Fort *v.* Roush, 104 U. S. 142.

[4] Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212; affirmed 48 N. Y. 665.

[5] Trotter *v.* White, 27 Miss. 88.

[6] Raun *v.* Reynolds, 15 Cal. 459.

[7] Walsh *v.* Rutgers Fire Ins. Co. 13 Abb. (N. Y.) Pr. 33.

CHAPTER XXXVII.

APPLICATION OF PROCEEDS OF SALE.

I. Payment of the mortgage debt, 1682, 1683.
II. Disposition of the surplus, 1684–1698.
III. Priorities between holders of several notes secured, 1699–1707.
IV. Costs of subsequent mortgagees, 1708.

I. *Payment of the Mortgage Debt.*

1682. In general. — The proceeds of the sale must be disposed of as directed in the decree of court, or by the rules and practice adopted by it. In general it may be said that the officer making the sale is first to pay out of the proceeds of it to the plaintiff or his attorney the amount of the mortgage debt with interest, and the costs of the proceedings. He should take a receipt for this, to file in court with his report of the sale. But the court, and not the officer appointed to make the sale, must determine all questions of priority of claim to the proceeds, and must see that the moneys reach the persons entitled to them.[1]

1683. If a mortgagee in order to preserve his security has been obliged to pay taxes or other charges upon the mortgaged property, he may add the amount to his mortgage upon foreclosure of it.[2] A prior judgment lien,[3] or rent due on leasehold premises,[4] or a prior mortgage that is due and payable,[5] if it be a lien upon the same premises, may be paid by the junior mortgagee, and he will succeed by subrogation to the rights of such prior party without any assignment or transfer of the prior claim to him. In such cases the mortgagee, on a bill to foreclose, is entitled to be reimbursed the sum he has paid, and to have a decree of indemnity out of the proceeds of the sale.[6]

[1] Eleventh Ward Savings Bank *v.* Hay, 55 How. (N. Y.) Pr. 444.

[2] See § **1173**; **New York**: Dale *v.* M'Evers, 2 Cow. 118; Burr *v.* Veeder, 3 Wend. 412; Faure *v.* Winans, Hopk. 283.

[3] Silver Lake Bank *v.* North, 4 Johns. (N. Y.) Ch. 370.

[4] Robinson *v.* Ryan, 25 N. Y. 320.

[5] Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35.

[6] Ellsworth *v.* Lockwood, 42 N. Y. 89, 96; Dale *v.* M'Evers, *supra*.

The taxes and assessments due on the property sold, if unpaid, are to be deducted from the moneys arising from the sale, unless it was made subject to them; but a direction to the officer in the judgment to so deduct the amount of them does not authorize the payment of them by him.[1]

But except when the mortgagee has paid prior liens, the proceeds of lands sold under a mortgage are applicable only to the mortgage debt, then to subsequent liens and incumbrances, and not to prior and paramount liens;[2] and after that the surplus is payable to the mortgagor, the owner of the equity of redemption, or other person entitled.[3]

II. *Disposition of the Surplus.*

1684. Usually the surplus money is paid into court to await its order of distribution.[4] Any party to the suit having a lien upon the premises subordinate to the mortgage upon which the sale was made may file a notice or petition, stating the nature and extent of his claim, and he may, according to the general practice, have an order of reference to ascertain and report the amount due to him, and to others having liens upon the property. Notice of this is given to all claimants or others having liens, and the referee proceeds to ascertain the amounts due to each. The court has power to distribute the surplus among the persons entitled, although the mortgagor has died pending the proceedings, and his estate is in course of settlement in the probate or surrogate court. His heirs and creditors must apply for it there.[5]

1685. The court may appoint a master or referee to ascertain the rights of claimants to the surplus, and may confirm or set aside or refer back his report, or may, while the moneys remain in court, vacate the report and order further proof.[6] According to the practice of some courts this reference is allowed as a matter of course; while the practice of others is to allow it on application.[7]

[1] See § 1597; Opdyke *v.* Crawford, 19 Kans. 604; Cord *v.* Southwell, 15 Wis. 211.

[2] Reybold *v.* Herdman, 2 Del. Ch. 34; Hotchkiss *v.* Clifton Air Cure, 4 Keyes (N. Y.), 170; Koch *v.* Purcell, 45 N. Y. Superior Ct. 162.

[3] Day *v.* Town of New Lots (N. Y.), 13 N. E. Rep. 915.

[4] Clark *v.* Carnall, 18 Ark. 209; Baker *v.* Gladden, 72 Ga. 469.

[5] Loucks *v.* Van Allen, 11 Abb. (N. Y.) Pr. N. S. 427.

[6] Mut. Life Ins. Co. of N. Y. *v.* Salem, 3 Hun (N. Y.), 117.

[7] Ward *v.* Montclair Railway Co. 26 N. J. Eq. 260.

All parties to the foreclosure suit should have notice of the application for the surplus money, that they may appear and assert their rights, and the report should show on its face that they were summoned; and an order of payment without such notice will be set aside.[1] They should prove the nature of their respective liens and the amounts due them; verifying them in the same manner as creditors coming in under a decree are required to do in court.[2] The costs and expenses of proceedings for the distribution of the surplus are properly chargeable to the fund.[3] A creditor who was not a party to the suit generally bears the expense of proving his own claim; and the court may refuse a creditor his costs under other circumstances.[4]

1686. Upon the filing of the report of the referee exceptions may be taken to his findings of facts, and his conclusions upon them, and upon notice to the parties interested a hearing may be had; but, generally, if exceptions are not taken within a specified time after the filing of the report, the report stands confirmed. An order of distribution follows, directing the payment of the moneys in accordance with the report, when no exception has been taken to this, or otherwise in accordance with the determination of court upon the report. No payment can properly be made without such final order of court.[5]

1687. In general no claim which has not become an absolute lien upon the property can be considered, however equitable it may be.[6] Mechanics' liens, though not established by judgment,[7] and judgment liens, though not perfected by execution, are transferred from the land to the surplus money. After a sale upon execution under a judgment junior to the mortgage, the right of redemption not having expired at the time of the foreclosure sale, the general lien of the judgment is turned into a specific lien upon the surplus to the extent of the purchaser's bid

[1] Franklin *v.* Van Cott, 11 Paige (N. Y.), 129; Smith *v.* Smith, 13 Mich. 258.

[2] Hulbert *v.* McKay, 8 Paige (N. Y.), 651.

[3] Harvey *v.* Harvey, 6 Madd. 91; Oppenheimer *v.* Walker, 3 Hun (N. Y.), 30.

[4] Abell *v.* Screech, 10 Ves. 355, 359.

[5] *Ex parte* Allen, 2 N. J. Eq. (1 Green) 388; Franklin *v.* Van Cott, *supra.*

[6] Husted *v.* Dakin, 17 Abb. (N. Y.) Pr. 137; King *v.* West, 10 How. (N. Y.) Pr. 333; Mut. Life Ins. Co. *v.* Bowen, 47 Barb. (N. Y.) 618.

[7] Livingston *v.* Mildrum, 19 N. Y. 440. A judgment creditor, who was properly made a party to the suit, does not lose his right to share in the surplus by the fact that his judgment became dormant pending the action. Dempsey *v.* Bush, 18 Ohio St. 376. See §§ 1934, 1935.

and interest thereon.[1] If the purchaser's title has become complete at the time of the foreclosure sale, so that he is entitled to a deed, he is entitled to the whole surplus.[2] The claimant, whatever his lien may be, is not entitled to any part of the surplus money arising from the sale unless he was a party to the suit; for otherwise his lien is not affected by the proceedings, and the land is not discharged from it by the sale and transferred to the money;[3] unless, however, he files a cross-bill, or voluntarily appears in the original suit and establishes his claim.[4] When the subsequent lien-holders have been made parties to the suit, the decree of sale may properly direct the payment of any surplus, after satisfying the mortgage, among the lien creditors, according to their respective rights and equities; and no cross-bill is necessary for the purpose.[5] It is not necessary that the decree should find the precise amount due such lien-holder, if it finds that there is due him more than the surplus.[6]

The proceeds of the sale, after satisfying the mortgage debt, may be said, in general, to stand in place of the equity of redemption to those who had title or right in that or lien upon it.[7] If the mortgagor or his vendee be the only ones interested in it, the surplus belongs wholly to him. If he has died and his heirs are made parties to the suit, the surplus goes to them;[8] although it is held in some cases that the personal representatives are entitled to be heard on the petition for the surplus, on the ground that it is personalty.[9]

1688. When there are several liens upon the premises, the surplus money must be applied to their discharge in the order of their priority.[10] Generally a priority of right may be presumed from a priority of record. This presumption will prevail between the holders of several mortgages upon the property; and to overcome this presumption the burden of proof is upon the holder of a junior mortgage to overcome it by positive evidence of prior right.[11] Questions of priority between persons having claims upon

[1] Snyder *v.* Stafford, 11 Paige (N. Y.), 71; Clarkson *v.* Skidmore, 46 N. Y. 297.

[2] See § 1934.

[3] Winslow *v.* McCall, 32 Barb. (N. Y.) 241; Root *v.* Wheeler, 12 Abb. (N. Y.) Pr. 294. See Koch *v.* Purcell, 45 N. Y. Superior Ct. 162.

[4] Ellis *v.* Southwell, 29 Ill. 549.

[5] Crocker *v.* Lowenthal, 83 Ill. 579.

[6] Walker *v.* Abt, 83 Ill. 226.

[7] Habersham *v.* Bond, 2 Ga. Dec. 46.

[8] Shaw *v.* Hoadley, 8 Blackf. (Ind.) 165; Beard *v.* Smith, 71 Ala. 568, quoting text.

[9] Smith *v.* Smith, 13 Mich. 258.

[10] Averill *v.* Loucks, 6 Barb. (N. Y.) 470; Lithauer *v.* Royle, 17 N. J. Eq. 40.

[11] § 1929. **New York:** Freeman *v.*

the equity of redemption are properly settled after the sale, upon their application for the surplus after it has been brought into court, rather than by a stay of proceedings on the execution of the order of sale.[1] A judgment creditor may attack the validity of a subsequent conveyance of the equity of redemption, upon a reference for distribution of the purchase money.[2] Until it is ascertained that there will be a surplus, they are not permitted to litigate their claims between themselves.[3]

Upon such reference the referee may inquire as to the validity of conveyances or liens, and conveyances as well as liens may be attacked as fraudulent. The rights and equities of the lienholders or claimants are as much before the court, and as much the objects of its care, as those of the owner of the mortgage to be foreclosed.[4]

The fund collected by a receiver, appointed generally without reference to particular liens, on the application of either a senior or junior incumbrancer, is applicable to the liens on the property in the order of their priority, just as the proceeds from a sale are to be applied.[5]

Thus, where a receiver has been appointed under a first mortgage and has collected rents, and upon a sale of the property there is a surplus which is insufficient to pay a second mortgage upon the property, the court may direct the application of the rents in the receiver's hands to the payment of such second mortgage so far as needed, and the balance to be paid to the mortgagor or owner of the equity of redemption.[6] In cases where a receiver has been appointed on the application of a junior mortgagee for his benefit only, the rents collected by such receiver are applicable to the junior mortgage to the exclusion of the prior mortgages.[7]

1689. So if there be simultaneous mortgages upon the same land, they are in effect one instrument, and upon the foreclosure of one of them, the surplus remaining after satisfying that is ap-

Schroeder, 43 Barb. 618; Peabody *v.* Roberts, 47 Barb. 91; People *v.* Bergen, 53 N. Y. 404; *S. C.* 15 Abb. Pr. (N. S) 97. **Minnesota**: Brown *v.* Crookston Ag. Asso. 34 Minn. 545.

[1] Schenck *v.* Conover, 13 N. J. Eq. 31.

[2] Rogers *v.* Ivers, 23 Hun (N. Y.), 414.

[3] Union Ins. Co. Van Rensselaer, 4 Paige (N. Y.), 85.

[4] Bergen *v.* Carman, 79 N. Y. 146; Bergen *v.* Snedeker, 8 Abb. (N. Y.) N. C. 50; Livingston *v.* Mildrum, 19 N. Y. 440, 441; Beekman *v.* Gibbs, 8 Paige (N. Y.), 511; Halsted *v.* Halsted, 55 N. Y. 442; Schafer *v.* Reilly, 50 N. Y. 61; Tator *v.* Adams, 20 Hun (N. Y.), 131. King *v.* West, 10 How. Pr. 333, is questioned in Bergen *v.* Carman, *supra*.

[5] Williamson *v.* Gerlach, 41 Ohio St. 682.

[6] Keogh *v.* McManus, 34 Hun (N. Y.), 521.

[7] § 1524.

plicable to the payment of the other, although only part of it is due.[1] When such mortgages are held by different persons, the money arising from the sale of the property should be equitably divided between the mortgagees;[2] the fact that one was recorded before the other does not matter, if both mortgages were made under an agreement made by the mortgagor at the same time with both mortgagees.[3]

1690. The complainant himself may present and establish a claim to the surplus moneys by reason of another debt due him from the mortgagor. The validity and amount of this may be ascertained upon a reference, in the same manner as when a claim is presented by any other person;[4] and there is no obligation upon him to establish his claim beforehand.[5]

A junior mortgagee, who is a party to the suit, may have his rights protected by an appropriate decree as to the application of the surplus, if there be any after satisfying the prior mortgage.[6] He should, however, appear and ask for payment out of the surplus.[7] He cannot maintain a separate action to reach the surplus, but must enforce his claims in the court which rendered the judgment of foreclosure.[8]

1691. The equities of subsequent incumbrancers of part of the premises are to be regarded. In general it may be said that the same equities which govern the order of sale of property subject to other liens, or accompanied by other security in the hands of the mortgagee,[9] apply also to the distribution of the proceeds of sales under like circumstances. If the mortgage, under the circumstances of the case, is a charge upon all the land covered by the mortgage, and only a part of it is foreclosed, the proceeds must be applied to the discharge of a proportional part only of the debt, and the balance to the persons having incumbrances upon that part in their order.[10]

1692. A prior unrecorded mortgage is preferred to a subsequent judgment, if there was no fraudulent intent on the part of the mortgagee in withholding the mortgage from record, al-

[1] Barber *v.* Cary, 11 Barb. (N. Y.) 549.

[2] Eleventh Ward Savings Bank *v.* Hay, 55 How. (N. Y.) Pr. 444.

[3] Daggett *v.* Rankin, 31 Cal. 321.

[4] Beekman Fire Ins. Co. *v.* First M. E. Church in N. Y. 29 Barb. (N. Y.) 658; Field *v.* Hawxhurst, 9 How. (N. Y.) Pr. 75.

[5] Field *v.* Hawxhurst, *supra.*

[6] Ward *v.* McNaughton, 43 Cal. 159.

[7] Kenton *v.* Spencer, 6 Ind. 321.

[8] Fliess *v.* Buckley, 90 N. Y. 286.

[9] See chapter XXXVI.

[10] Mickle *v.* Rambo, 1 N. J. Eq. (Sax.) 501. See, also, Frost *v.* Peacock, 4 Edw. (N. Y.) 678.

though it was given to secure future advances or liabilities.[1] It is also held that a mortgage which is equitable only, not being formally executed, is preferred to a subsequent judgment if given for a present consideration.[2]

1693. Dower and homestead in surplus. — A widow who as wife had joined her husband in a mortgage of land of which he was seised is in equity entitled to dower in surplus moneys arising from a foreclosure sale of the property, after satisfying the mortgage debt. To the extent of the debt secured by the mortgage in which she released her right her dower interest is extinguished, and she is dowable only of the surplus.[3] The surplus stands in the place of the equity of redemption and retains all the properties of realty, and does not become personalty for the purposes of distribution among the next of kin. While therefore a widow may claim dower in the surplus, she cannot claim the surplus as personal property under a statutory exemption.[4] If her husband die after the judicial sale and the distribution of the surplus, of course she cannot claim any interest in it; but if he die after the sale and while the surplus, or even a part of it, is within the control of the court, she is dowable of the surplus so far as her right can be equitably paid from the portion remaining.[5] If, however, some of those interested in the surplus have received their portions before her claim was made, they cannot be called upon to refund, nor can the others, who have not received their shares, be called upon to suffer loss by reason of the payments made. She is in such case dowable only of the surplus remaining undistributed, and not of the whole surplus.[6]

Even after the surplus had been paid under order of the court to an assignee of the mortgagor, the widow who had neglected to

[1] See §§ **460, 461**; Thomas *v.* Kelsey, 30 Barb. (N. Y.) 268.

[2] See § **470**.

[3] See § **666**; **Ohio**: Fox *v.* Pratt, 27 Ohio St. 512; Culver *v.* Harper, 27 Ohio St. 464; State Bank of Ohio *v.* Hinton, 21 Ohio St. 509; Taylor *v.* Fowler, 18 Ohio, 567; Rands *v.* Kendall, 15 Ohio, 671; Unger *v.* Leiter, 32 Ohio St. 210. **New York**: Matthews *v.* Duryee, 45 Barb. 69; *S. C.* 17 Abb. Pr. 256; Titus *v.* Neilson, 5 Johns. Ch. 452; Hawley *v.* Bradford, 9 Paige, 200; Bell *v.* Mayor of N. Y. 10 Paige, 49; Blydenburgh *v.* Northrop, 13 How. Pr. 289. **Other States**: Hinchman *v.* Stiles, 9 N. J. Eq. (1 Stockt.) 454; Tibbetts *v.* Langley Manufacturing Co. 12 S. C. 465; Leary *v.* Shaffer, 79 Ind. 567.

[4] Beard *v.* Smith, 71 Ala. 568.

[5] Pickett *v.* Buckner, 45 Miss. 226. In England, prior to the statute of 3 & 4 Wm. 4, ch. 105, a widow was not dowable of an equity of redemption, and of course she was not of the surplus after a foreclosure sale.

[6] State Bank of Ohio *v.* Hinton, *supra*.

appear in the foreclosure suit, and was not notified of the reference respecting the distribution of the surplus, was allowed to maintain an action to recover her dower in the surplus against such assignee.[1]

When land is sold under a mortgage containing a waiver of homestead exemption, the mortgagor is entitled to the exemption out of the surplus as against subsequent judgment creditors.[2] And so when a right of homestead has been released in a mortgage, and this is foreclosed against the widow and heirs of the mortgagor, and there be a surplus, this is payable to the widow to the extent of the homestead exemption.[3] When homestead land is sold under a preëxisting mortgage, the homestead exemption attaches to the money arising from the sale in excess of the amount required to satisfy the mortgage debt.[4]

1694. Inchoate right of dower. — In some cases the courts have gone so far as to protect the inchoate interest of the wife during coverture in the surplus arising from a mortgage sale, by permitting her, as against judgment creditors, to have one third of the residue invested for her benefit, and kept invested during the joint lives of herself and her husband, and the interest paid to her during her own life, in case of her surviving her husband.[5] But it would seem doubtful whether a court of equity, in the exercise of its ordinary jurisdiction, has the power to enforce such a doctrine;[6] and the authority is against allowing the wife any such right against her husband's creditors.[7]

In a recent case in Indiana, however, where a wife had joined her husband in executing a mortgage of his lands to secure his indebtedness, and he was adjudged a bankrupt, whereby her inchoate third of his lands became absolute under the statute, it was held to be her right, upon foreclosure of the mortgage, to have a decree that the other two thirds be first sold, if it appear

[1] Matthews *v.* Duryee, 45 Barb. (N. Y.) 69. Sutherland, J., dissented, saying: "If the plaintiff has any remedy, it appears to me that it must be by a motion or proceeding to vacate or modify the order under which the money was paid to the defendant."

[2] Quinn's Appeal, 86 Pa. St. 447; Hill *v.* Johnston, 29 Pa. St. 362; Vermont Sav. Bank *v.* Elliott, 53 Mich. 256; Smith *v.* Rumsey, 33 Mich. 183; Lozo *v.* Sutherland, 38 Mich. 168; Anderson *v.* Odell, 51 Mich. 492.

[3] McTaggart *v.* Smith, 14 Bush (Ky.), 414; *S. C.* 7 Reporter, 369.

[4] People *v.* Stitt, 7 Bradw. (Ill.) 294.

[5] § 1933; Denton *v.* Nanny, 8 Barb. (N. Y.) 618; Vreeland *v.* Jacobus, 19 N. J. Eq. 231. See, however, Riddick *v.* Walsh, 15 Mo. 519.

[6] Scribner on Dower, p. 480, § 30.

[7] Dean *v.* Phillips, 17 Ind. 406.

that such two thirds is of value sufficient to discharge the debt.[1] The wife in such case does not occupy the position of a surety of the debt secured, and she cannot maintain a bill to charge the mortgagee with the proceeds of sales of crops also covered by the mortgage, which proceeds, by arrangement between the mortgagee and the mortgagor, her husband, were applied to the payment of unsecured debts.[2]

1695. The surplus of a sale made after the death of the mortgagor is real estate, though personal if the sale is made in his lifetime.[3] A devise of the property in trust to pay debts does not make personal assets of the surplus.[4] The rule in Massachusetts is, however, different. The legal title to the proceeds of such sale is held to be in the executor or administrator, by force of the contract of mortgage, though when he has collected the money he holds it in trust for the heirs or devisees, as the case may be.[5]

1696. A lessee for years of the mortgagor is not entitled to any part of the surplus arising from the sale. The lease is extinguished by the foreclosure, and all title of the lessee is cut off. His only claim would be one against the mortgagor for a breach of the covenant for quiet enjoyment if the lease contained such a covenant.[6]

1697. An attachment of the proceeds of the foreclosure sale is subject to the claims of mortgagees or other incumbrancers of record.[7] If the mortgagor after the maturity of the mortgage be summoned as garnishee or trustee of the mortgagee, the latter cannot defeat the lien acquired by the attaching creditor by a subsequent assignment of the mortgage. If the assignee by such assignment foreclose the mortgage, the lien of the attaching cred-

[1] Leary *v.* Shaffer, 79 Ind. 567; Crawford *v.* Hazelrigg (Ind.), 18 N. E. Rep. 603.

[2] Creath *v.* Creath (Tenn.), 8 S. W. Rep. 847.

[3] Wright *v.* Rose, 2 S. & S. 323; Dunning *v.* Ocean Nat. Bank, 61 N. Y. 497, and cases cited; Fliess *v.* Buckley, 22 Hun (N. Y.), 551.

[4] § 1931; Clay *v.* Willis, 1 B. & C. 364.

[5] Varnum *v.* Meserve, 8 Allen (Mass.), 158, 160. It may be observed that the contract in Wright *v.* Rose, *supra*, was also to pay the mortgagor, his "executors, or administrators," so that the cases are in conflict. Dwight, C., in Dunning *v.* Ocean Nat. Bank, *supra*, observes, that "the true construction of those words undoubtedly is, that the promise is to pay the executors or administrators whenever it might have been collected by the mortgagor, as *e. g.* where the land was sold in his lifetime." See chapter XL, div. 16.

[6] Burr *v.* Stenton, 52 Barb. (N. Y.) 377; *S. C.* 43 N. Y. 462.

[7] West *v.* Shryer, 29 Ind. 624.

itor must be first satisfied.[1] It is said in this case that such creditor has the same right to enforce the mortgage that the mortgagee had.

1698. Upon a sale under a junior mortgage, a surplus belongs to the mortgagor, and is not applied to the satisfaction of a prior mortgage; for the equity of redemption which is sold belongs to the mortgagor, and the presumption of law is, that the purchaser of it only pays for it its worth in excess of the prior mortgage debt.[2] But sometimes the whole estate is sold under the decree of court, or by consent of the parties interested, in which case the prior parties in interest may be made parties to the proceedings in relation to the distribution;[3] and a prior mortgagee who has been in possession must account for the rents and profits received by him.[4]

There may also be other circumstances under which equity will require the mortgagee, out of the money received by him on the sale applicable to the payment of his demand, to pay a prior incumbrance; as, for instance, where he has in the first place conveyed the land to the mortgagor with covenants against all incumbrances and taken back the mortgage for the purchase money, if there be a prior mortgage upon the property the proceeds will be applied, in the first place, to the discharge of that, and the amount so applied deducted from his claim under the mortgage.[5]

III. *Priorities between Holders of several Notes secured.*

1699. Priority of maturity. — It is the settled rule in several states that where a mortgage has been given to secure several notes falling due at various times, and the notes are assigned to different holders, the one first maturing is to be first paid out of the mortgaged property; the mortgage, as to the several notes, being equivalent to so many successive mortgages.[6] The rule

[1] Campbell *v.* Nesbitt, 7 Neb. 300.

[2] Western Ins. Co. *v.* Eagle Fire Ins. Co. 1 Paige (N. Y.), 284; Hanger *v.* State, 27 Ark. 667; Firestone *v.* State, 100 Ind. 226.

[3] Porter *v.* Barclay, 18 Ohio St. 546; Dodge *v.* Silverthorn, 12 Wis. 644.

[4] Goring *v.* Shreve, 7 Dana (Ky.), 64.

[5] § 1504; Van Riper *v.* Williams, 2 N. J. Eq. (1 Green) 407; Johnson *v.* Blydenburgh, 31 N. Y. 427; Stiger *v.* Bacon, 29 N. J. Eq. 442; Woodruff *v.* Depue, 14 N. J. Eq. 168; Union Nat. Bank of Rahway *v.* Pinner, 25 N. J. Eq. 495; Dayton *v.* Dusenbury, Ib. 110; White *v.* Stretch, 22 N. J. Eq. 76.

[6] See §§ **606, 1459, 1478, 1577, 1939.** **Illinois:** Koester *v.* Burke, 81 Ill. 436; Herrington *v.* McCollum, 73 Ill. 476; Gardner *v.* Diederichs, 41 Ill. 158; Sargent *v.* Howe, 21 Ill. 148; Funk *v.* McReynold, 33 Ill. 481; Vansant *v.* Allmon, 23 Ill. 30. **Wisconsin:** Pierce *v.* Shaw, 51 Wis. 316; Marine Bank *v.* In-

rests upon the fact that the holder of the note first maturing may foreclose upon non-payment, without waiting for the succeeding notes to mature. The power to do so implies a priority of lien in the notes first falling due.[1]

ternational Bank, 9 Wis. 57; Wood *v.* Trask, 7 Wis. 566. **Indiana**: State Bank *v.* Tweedy, 8 Blackf. 447; Hough *v.* Osborne, 7 Ind. 140; Crouse *v.* Holman, 19 Ind. 30; Murdock *v.* Ford, 17 Ind. 52; Stanley *v.* Beatty, 4 Ind. 134; Davis *v.* Langsdale, 41 Ind. 399; Minor *v.* Hill, 58 Ind. 176; People's Savings Bank *v.* Finney, 63 Ind. 460; Doss *v.* Ditmars, 70 Ind. 451. **Iowa**: Hinds *v.* Mooers, 11 Iowa, 211; Massie *v.* Sharpe, 13 Iowa, 542; Walker *v.* Schreiber, 47 Iowa, 529. **Ohio**: Winters *v.* Franklin Bank, 33 Ohio St. 250; Kyle *v.* Thompson, 11 Ib. 616. **West Virginia**: Norris *v.* Beaty, 6 W. Va. 477, 483. **Vermont**: Belding *v.* Manly, 21 Vt. 550. **Missouri**: Huffard *v.* Gottberg, 54 Mo. 271. **Kansas**: Richardson *v.* McKim, 20 Kans. 346. **Virginia**: McClintic *v.* Wise, 25 Gratt. 448; Gwathmeys *v.* Ragland, 1 Rand. 466. **Alabama**: M'Vay *v.* Bloodgood, 9 Port. 549. **New Hampshire**: Hunt *v.* Stiles, 10 N. H. 466. **Florida**: Wilson *v.* Hayward, 6 Fla. 171, 190.

[1] Thompson *v.* Field, 38 Mo. 320; Mitchell *v.* Ladew, 36 Mo. 526; Ellis *v.* Lamme, 42 Mo. 153; Wilson *v.* Hayward, *supra;* and see Chew *v.* Buchanan, 30 Md. 367, where the question was raised but not decided. See, also, Burhans *v.* Mitchell, 42 Mich. 417.

The reason given for this rule, as also that given for a priority founded on priority of assignment, does not seem to be convincing. "While the notes were in the hands of the mortgagee there could be no priority of liens. He was not bound to foreclose when default was made in the payment of the note first falling due. He could have waited until all became due, and then, if the mortgage empowered him to sell when default should be made in the payment of any one of the notes, have sold the property and appropriated the proceeds of the sale, if the mortgage did not forbid, to the payment of any of the notes, if there were not more than enough for that purpose. Saunders *v.* McCarthy, 8 Allen, 42; Allen *v.* Kimball, 23 Pick. 473; Mathews *v.* Switzler, 46 Mo. 301. If he appropriated the proceeds to the payment of the note first falling due, it thereby attained a preference through the act of the mortgagee, and so might have the second or last in the same manner. The mortgagee being the owner of all the notes, unrestricted by the mortgage, can give the preference, in the appropriation of the proceeds, to either of them by virtue of his ownership and control over the entire mortgage debt; and the question of preference or right to priority in payment out of the proceeds can only arise when there is a diversity in the ownership of the debt secured. Hence the assignment of one of the notes could not, *ipso facto,* carry with it the right to be paid in preference to the other notes, because the mortgagee had the right to appropriate the proceeds of the sale of the property mortgaged to its payment, — for the condition on which the mortgagee could have exercised the power does not exist in the case of the assignee of one of the notes; and for the same reason it follows that the assignee of the note first falling due is not entitled to preference, because the mortgagee could have given preference in the appropriation of payments when he owned all the notes. The comparison of a mortgage given to secure several notes to successive mortgages given to secure each one of them, does not support the doctrine it is made to prove. To make the cases analogous, the mortgages to secure each note must bear the same date, and be executed, delivered, filed for record, and recorded at the same time, and the property mortgaged must be the same. In the latter case the mortgages would be concurrent; neither one would have preference over the others, and all would have equal claims to be paid ratably out of the property mortgaged. If one should be

1700. Payment of notes not due. — The surplus cannot be paid to the holder of the notes not due: courts do not make contracts for parties, nor require them to pay their debts before they have agreed to pay them. The prudent method in taking securities of this kind is to provide against all these contingencies by the express provisions of the deed. A court of equity will, however, save the holder of subsequent notes from the loss of his security through the payment of the surplus to the mortgagor, by staying payment, and providing that it be held to meet the notes not due.[1]

This legal effect of the mortgage cannot be varied or altered by parol testimony. But it would seem that when the mortgagee assigns the notes to different persons, he may, by agreement with them, fix their rights of priority in payment.[2]

1701. Priority of assignment. — An assignee of the mortgage with part of the debt is generally entitled to payment in preference to the mortgagee, who retains one of the notes;[3] while, as between different assignees of mortgage bonds or notes, priority of assignment generally gives no preference, though the cases are

transferred to a third party it would not thereby become paramount to the others, but all would stand on an equality. Hence the comparison does not sustain the doctrine that the notes, while in the hands of different persons, are entitled to priority of payment according to the order in which they mature." Penzel *v.* Brookmire (Ark.), 10 S. W. Rep. 15, per Battle, J.

[1] "Independent of any legal and binding agreement, where a mortgage is executed to secure two or more notes maturing at different times, the proceeds arising from a foreclosure of the mortgaged premises should be applied to the payment of the notes in the order in which they fall due. The different instalments in a mortgage securing such notes are regarded as so many successive mortgages, each having priority according to the time of maturity; and where, instead of one mortgage being executed to secure several notes given for the same indebtedness, a separate mortgage is given to secure each note, the rights of the parties are identical."

Iowa: Isett *v.* Lucas, 17 Iowa, 503; Grapengether *v.* Fejervary, 9 Iowa, 163; Sangster *v.* Love, 11 Iowa, 580; Reeder *v.* Carey, 13 Iowa, 274; Massie *v.* Sharpe, 13 Iowa, 542; Hinds *v.* Mooers, 11 Iowa, 211; Rankin *v.* Major, 9 Iowa, 297; Bank of the U. S. *v.* Covert, 13 Ohio, 240. **Indiana**: State Bank *v.* Tweedy, 8 Blackf. 447; Gerber *v.* Sharp, 72 Ind. 553; Minor *v.* Hill, 58 Ind. 176; People's Savings Bank *v.* Finney, 63 Ind. 460; Doss *v.* Ditmars, 70 Ind. 451.

[2] Grattan *v.* Wiggins, 23 Cal. 16.

[3] § **822**; Bryant *v.* Damon, 6 Gray (Mass.), 564; Warden *v.* Adams, 15 Mass. 233; Cullum *v.* Erwin, 4 Ala. 452; Salzman *v.* Creditors, 2 Rob. (La.) 241; Van Rensselaer *v.* Stafford, Hopk. (N. Y.) 569; Clowes *v.* Dickenson, 5 Johns. (N. Y.) Ch. 235; Pattison *v.* Hull, 9 Cow. (N. Y.) 747; Mechanics' Bank *v.* Bank of Niagara, 9 Wend. (N. Y.) 410; Stevenson *v.* Black, 1 N. J. Eq. (Sax.) 338; Parkhurst *v.* Watertown Steam Engine Co. 107 Ind. 594.

not in harmony. The equity arising from priority of assignment, where this equity is held to give a preference, is generally regarded as paramount to the equity arising from the maturity of the notes as against the assignor; but as between different assignees, the equity arising from priority of maturity is paramount.[1] Generally it may be said the effect of an assignment of one of the mortgage notes is to carry a *pro rata* interest in the security, subject to the paramount claim of notes previously due;[2] and to give no right based upon priority of assignment, except as against the assignor.[3]

The fact that an assignee of one of the mortgage notes has also an assignment of the mortgage gives him no priority of right over the assignee of another note separate from the mortgage, but both are equally entitled to the benefit of the security.[4]

Where a holder of a mortgage assigns a part of it, although he warrants only the existence of the debt at the time of the transfer, it would be contrary to good faith to permit him, after receiving the money for this part of the claim, to come into competition with his assignee, if the property prove insufficient to pay the claims of both.[5] Unless the intention be plainly declared on the face of the assignment that the assignee is to share *pro rata* in the security with the assignor, the equitable construction of it is that it must in the first place be applied for the payment of the part of the debt which was assigned.[6] A proviso in the assignment, that it shall not be so construed as to prevent the mortgagee from receiving or disposing of the residue of the mortgage, does not entitle him to participate with the assignee in the proceeds of it when these are less than the debt.[7]

1701 *a*. Pro rata division. In many states, however, the rule has been adopted that the proceeds of the mortgaged property should be divided, *pro rata*, among all the notes secured by the mortgage, without regard either to the times of their falling due,

[1] Winters *v.* Franklin Bank, 33 Ohio St. 250; Parkhurst *v.* Watertown Steam Engine Co. 107 Ind. 594; People's Sav. Bank *v.* Finney, 63 Ind. 460; Doss *v.* Ditmars, 70 Ind. 451.

[2] State Bank *v.* Tweedy, 8 Blackf. (Ind.) 447.

[3] Bank of the U. S. *v.* Covert, 13 Ohio, 240. See § 822.

[4] Waterman *v.* Hunt, 2 R. I. 298.

[5] Salzman *v.* Creditors, 2 Rob. (La.) 241; Barkdull *v.* Herwig, 30 La. Ann. 618; McClintic *v.* Wise, 25 Gratt. (Va.) 448; Anderson *v.* Sharp, 44 Ohio St. 260, quoting text; Griggsby *v.* Hair, 25 Ala. 327.

[6] Waterman *v.* Hunt, *supra;* Bryant *v.* Damon, 6 Gray (Mass.), 564. See, also, Wright *v.* Parker, 2 Aik. (Vt.) 212; Richardson *v.* McKim, 20 Kans. 346.

[7] Mechanics' Bank *v.* Bank of Niagara, 9 Wend. (N. Y.) 410.

or the dates of their assignment, unless the assignment show a contrary intention.[1] The fact that one of the notes has become barred by the statute of limitations since the sale does not affect the right of the holder to share in the proceeds.[2]

1702. It is competent, however, for the parties to change this general rule of law in respect to priority, by an express agreement in the deed that the note last falling due shall have priority of lien;[3] or by a subsequent agreement made between the mortgagee and his assignee upon the assignment of part of the notes,[4] reserving equal rights to the holders of the notes not assigned,[5] or otherwise establishing the equality or inequality of lien of the several notes.

1703. When the mortgage provides that upon any default the whole mortgage debt shall become due and payable, then there can be no preference given to the holder of the note on which default was made over the holder of the note not then due, because by such default the whole debt became due at the same time. A *pro rata* distribution should then be made between the holders of different parts of the debt.[6]

[1] **California**: Phelan *v.* Olney, 6 Cal. 478; Grattan *v.* Wiggins, 23 Cal. 16.

In **Maryland**: Chew *v.* Buchanan, 30 Md. 367, Bartol, C. J., dissenting; Dixon *v.* Clayville, 44 Md. 575.

Michigan: English *v.* Carney, 25 Mich. 178; Cooper *v.* Ulmann, Walk. Ch. 251; McCurdy *v.* Clark, 27 Mich. 445; Wilcox *v.* Allen, 36 Mich. 160.

In **Mississippi**: Parker *v.* Mercer, 7 Miss. (6 How.) 320; Cage *v.* Iler, 13 Miss. (5 Sm. & M.) 410; Henderson *v.* Herrod, 18 Miss. (10 Sm. & M.) 631; Jefferson College *v.* Prentiss, 29 Miss. 46; Bank of England *v.* Tarleton, 23 Miss. 173; Pugh *v.* Holt, 27 Miss. 461; Davidson *v.* Allen, 36 Miss. 419.

In **Pennsylvania**: Donley *v.* Hays, 17 S. & R. 400, Gibson, C. J., dissenting; Betz *v.* Heebner, 1 Penn. 280; Perry's Appeal, 22 Pa. St. 43; Hancock's Appeal, 34 Pa. St. 155; Mohler's Appeal, 5 Pa. St. 418, 420.

Tennessee: Ewing *v.* Arthur, 1 Humph. 537; Smith *v.* Cunningham, 2 Tenn. Ch. 565, 569; Andrews *v.* Hobgood, 1 Lea, 693; Ellis *v.* Roscoe, 4 Baxter, 418.

Texas: Delcspine *v.* Campbell, 52 Tex. 4; Paris Exchange Bank *v.* Beard, 49 Tex. 358, 363; Robertson *v.* Guerin, 50 Tex. 317.

Connecticut: Lewis *v.* De Forest, 20 Conn. 427.

Maine: Johnson *v.* Candage, 31 Me. 28; Moore *v.* Ware, 38 Me. 496.

Massachusetts: Eastman *v.* Foster, 8 Met. 19.

Georgia: Russell *v.* Carr, 38 Ga. 459.

Louisiana: Ventress *v.* Creditors, 20 La. Ann. 359.

New Jersey: Collerd *v.* Huson, 34 N. J. Eq. 38.

South Carolina: Graham *v.* Jones, 24 S. C. 241.

Minnesota: Wilson *v.* Eigenbrodt, 30 Minn. 4; 13 N. W. Rep. 907.

Arkansas: Penzel *v.* Brookmire, 10 S. W. Rep. 15.

Nebraska: Studebaker *v.* M'Curger, 30 N. W. Rep. 686.

[2] Weaver *v.* Alter, 3 Woods, 152.

[3] Ellis *v.* Lamme, 42 Mo. 153.

[4] Grattan *v.* Wiggins, *supra.*

[5] Howard *v.* Schmidt, 29 La. Ann. 129.

[6] See §§ **1179–1183**; Bank of the U. S.

1704. If the mortgagor has a right of set-off against the mortgage notes, which are in the hands of various assignees, and the offset is made against one note, the proceeds of the sale should be so distributed as to make the final distribution conformable with their equitable rights under the law; as, for instance, under the rule adopted in Kentucky, to make all the assignees contribute ratably to the set-off.[1]

1705. When the mortgage secures debts due to different persons there may be either express or implied priorities between them. An agent, with the assent of his principal, having included in a mortgage to the latter a debt due from the mortgagor to himself, it was held, in the absence of any agreement as to preference, that the debt due the principal should first be paid out of the proceeds of a foreclosure sale.[2]

It is frequently the case that the instrument of assignment by its terms indicates or confers a preference upon the assignee as to the part of the claim assigned to him.

1706. Rights of sureties. — When the mortgage secures several debts, for some of which there are sureties who are not parties to the mortgage, the mortgagee becomes a trustee for the sureties to the amount of the funds thus provided for their indemnity; and he must see that the proceeds of a sale of the property are applied in just proportions to the discharge of the debts on which the sureties are bound. Neither the mortgagor nor the mortgagee will be allowed to defeat the rights of the sureties, who have a right to be indemnified out of the property.

If in such case some of the debts include usurious interest, the mortgagor alone can avail himself of this defence. A surety on a debt paying legal interest cannot complain. He gets all the security that he bargained for when the mortgage was executed.[3]

1707. Sale for instalment. — As already noticed, when a sale is made of the entire premises for the non-payment of an instalment of the mortgage, and there is a surplus after paying the amount due on the mortgage at the time, the court may

v. Covert, 13 Ohio, 240; Bushfield *v.* Meyer, 10 Ohio St. 334; Pierce *v.* Shaw, 51 Wis. 316.

In **Missouri**, however, it is held that without an express agreement to that effect the priority of right arising from the time of payment of the several notes secured is not impaired by such a provision in a mortgage or deed of trust. Hurck *v.* Erskine, 45 Mo. 484; Mitchell *v.* Ladew, 36 Mo. 526; Thompson *v.* Field, 38 Mo. 320.

[1] Campbell *v.* Johnston, 4 Dana (Ky.), 177.

[2] Philips *v.* Belden, 2 Edw. (N. Y.) 1.

[3] Fielder *v.* Varner, 45 Ala. 429.

retain this, and apply it to the subsequent instalments as they become due;[1] or, as some courts hold or statutes provide, may immediately apply the surplus to the payment of the notes not yet matured.[2]

V. *Costs of Subsequent Mortgagees.*

1708. When proceeds of the sale under a decree in equity are insufficient to pay all the incumbrances in full, each mortgagee is entitled to be paid his costs as well as his debt, according to his priority, whether the bill be filed by the first or any subsequent mortgagee. The rule adopted in equity under a creditor's bill, when a fund is in court and is to be distributed among several claimants *pro rata*, or when the construction of a will is in doubt, and the rights of different claimants are to be determined, that the costs of all the parties shall in the first place be paid out of the fund, has no application in the case of the foreclosure of mortgages, for the parties have priority according to fixed rules of law. Of course it may happen that a subsequent mortgagee, after having incurred costs of suit and of sale, may lose these as well as his demand also, as where the proceeds of sale are only sufficient to pay the debt and costs due to the first mortgagee; but this was the risk assumed by taking the subsequent incumbrance. This rule seems best adapted to secure the rights of the parties, and is well established both in our own courts[3] and in those of England.[4] Where, however, a first mortgagee having a mortgage containing a power of sale lost his deed, and was obliged to resort to a suit in equity to obtain a sale, subsequent incumbrancers were allowed their costs, although the proceeds of sale were not sufficient to pay the plaintiff in full,[5] apparently because there should have been no occasion to come into equity. And where a mortgagee with a power of sale filed a bill, Baron Alderson said that the subsequent incumbrancers, being brought into court without necessity, were entitled to their costs, although the proceeds of sale were insufficient to pay the first mortgage.[6]

[1] § 1459; McDowell *v.* Lloyd, 22 Iowa, 448.

[2] Fowler *v.* Johnson, 26 Minn. 338.

[3] Mayer *v.* Salisbury, 1 Barb. (N. Y.) Ch. 546; Smack *v.* Duncan, 4 Sandf. (N. Y.) Ch. 621; Farmers' Loan & Trust Co. *v.* Millard, 9 Paige (N. Y.), 620; Boyd *v.* Dodge, 10 Paige (N. Y.), 42; Lithauer *v.* Royle, 17 N. J. Eq. 40.

[4] Upperton *v.* Harrison, 7 Sim. 444, and cases there cited.

[5] Wontner *v.* Wright, 2 Sim. 543.

[6] Cooke *v.* Brown, 4 Y. & C. Exch. 227.

CHAPTER XXXVIII.

JUDGMENT IN AN EQUITABLE SUIT FOR A DEFICIENCY. 1709–1721.

1709. Generally. — By reference to the statutory provisions of the several states respecting foreclosure, it will be observed that in most of the states in which foreclosure is effected by an equitable action, authority is given to the court to adjudge the payment by the mortgagor, or any other person liable for the debt, of any deficiency there may be remaining unsatisfied after a sale of the mortgaged land. The codes of several states contain a provision, to which reference only is made in the statutes relating specifically to the subject of foreclosure, as follows: "In actions to foreclose mortgages, the court shall have power to adjudge and direct payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action; and the court may adjudge payment of the residue of such debt remaining unsatisfied, after a sale of the mortgaged premises, against such other person, and may enforce such judgment as in other cases." This provision exists in substantially the same terms in the states of New York, Wisconsin, Nebraska, and South Carolina.[1]

Provisions differing somewhat from the foregoing are found in other states.

The Supreme Court of the United States, in 1864, in order to assimilate the practice in the circuit courts to the general practice in the state courts, adopted a rule that in all suits in equity for the foreclosure of mortgages in the circuit courts, or in any of the courts of the territories, a decree may be rendered for any

[1] **New York**: Code of Civ. Pro R. S. 5th ed. § 1627.
Wisconsin: R. S. 1878, § 3156.
Nebraska: Code of Civ. Pro. §§ 847, 849; Comp. Stats. 1885, p. 726.
South Carolina: G. S. 1882, Code of Civ. Pro. § 188.

deficiency found due after applying the proceeds of the sale.[1] This rule applies to the courts of the District of Columbia.[2] The power vested in the federal courts by this rule is a discretionary one, and may be exercised or not, as the court deems best.[3]

In Tennessee the chancery court changed the practice without a rule of court, partly on the ground of the maxim that, having jurisdiction for one purpose, the court ought to assume it for all purposes. A decree for the deficiency can be had under a prayer for general relief.[4]

The judgment contemplated is one for the balance of the debt remaining after applying towards it the proceeds of the sale. The first step is to ascertain what the amount of this balance is. Therefore a judgment for a deficiency can be had only when the sale is completed; and it can only be known what the deficiency is upon the coming in of the report of sale, and the confirmation of this.[5] The usual practice is for the referee to state the amount of the deficiency in his report of the sale, and to determine who of the defendants are liable to pay the same to the plaintiff. This is provided for in the original judgment.[6] There can generally be no contingent judgment for such deficiency entered beforehand;[7] at any rate no execution can be issued beforehand.[8] An execution for a deficiency should not be issued without special application to the court, and notice to the defendant.[9] But when the person liable for deficiency does not appear in the cause, it is the practice, after calculation of the amount, to award execution for the deficiency without giving him notice of the motion.[10]

[1] 1 Wall. p. v; Connecticut Mut. Life Ins Co. *v.* Tyler, 8 Biss. 369. It had previously been decided that such a decree could not be made in the absence of such a rule. Noonan *v.* Lee, 2 Black, 499; Orchard *v.* Hughes, 2 Black, 499; 1 Wall 73.

[2] Freedman's Savings & Trust Co. *v.* Dodge, 7 Wash. L. R. 92; affirmed Dodge *v.* Freedman's Savings & Trust Co. 106 U. S. 445; Hayden *v.* Snow, 9 Biss. 511.

[3] Phelps *v.* Loyhed, 1 Dill. 512.

[4] Nolen *v.* Woods, 12 Lea (Tenn.), 615.

[5] Bank of Rochester *v.* Emerson, 10 Paige (N. Y.), 359; Baird *v.* McConkey, 20 Wis. 297; Bache *v.* Doscher, 41 (N. Y.) Superior Ct. 150; Tormey *v.* Gerhart, 41 Wis. 54; Mickle *v.* Maxfield, 42 Mich. 304; Crowley *v.* Harader, 69 Iowa, 83; Hall *v.* Young (S. C.), 6 S. E. Rep. 938; Presley *v.* McLean, 80 Ala. 309; Winston *v.* Browning, 61 Ala. 80; Sayre *v.* Elyton Land Co. 73 Ala. 85; Clapp *v.* Maxwell, 13 Neb. 542.

[6] McCarthy *v.* Graham, 8 Paige (N. Y.), 480.

[7] Cobb *v.* Thornton, 8 How. (N. Y.) Pr. 66; Bache *v.* Doscher, *supra;* but see Moore *v.* Shaw, 15 Hun (N. Y.), 428.

[8] Howe *v.* Lemon, 37 Mich. 164; Ayers *v.* Rivers, 64 Iowa, 543.

[9] Gies *v.* Green, 42 Mich. 107; Ransom *v.* Sutherland, 46 Mich. 489.

[10] White *v.* Zust, 28 N. J. Eq. 107.

A foreclosure sale made before the date fixed by the decree and without notice to the defendant is illegal, and no judgment of deficiency can be founded on such sale.[1]

The sum for which the mortgaged premises were sold must, so long as the sale stands, be taken, as between the parties to the suit, as a conclusive test of their value; and the amount of the deficiency for which a decree shall be entered is ascertained accordingly, and not by taking the market value at the time, in case this happens to exceed the amount obtained at the sale.[2]

The deficiency contemplated is, moreover, such as has been ascertained by a sale under plaintiff's judgment. Therefore, where a second mortgagee commenced a suit to foreclose his mortgage, and for a deficiency, and recovered judgment, and subsequently obtained an order vacating the judgment and allowing him to amend by bringing in an additional party, and pending further proceedings a prior mortgagee, by decree, sold the property for a sum only sufficient to pay the first mortgage and costs, the second mortgagee was not allowed to have the order setting aside his judgment vacated, and a judgment for a deficiency entered for the full amount due on his mortgage. His only remedy was by an action at law upon the mortgage bond.[3]

The foreclosure decree fixes the amount of the mortgage debt, and is a final adjudication of this; and in issuing an execution for a deficiency, no objections to the amount of the decree can be considered except such as go to its discharge and have arisen since the confirmation of the sale.[4]

A second mortgagee, who is a party to a bill to foreclose a first mortgage, cannot, by filing a cross-bill against the mortgagor, obtain a decree for deficiency on his own mortgage.[5]

Persons who are only liable for the debt after the mortgaged property has been applied to its liquidation, as, for instance, mortgagors who have sold the land to others who have assumed the mortgage debt, have a right to require the sale of the whole equity of redemption for that purpose; and therefore they may require the joining of all persons who have any interest in the property, so that all equities in it may be extinguished. Although the ownership is in doubt or disputed, the court will order the person who appears to have an interest in the land to be brought in.[6]

[1] Shier *v.* Prentis, 55 Mich. 175.
[2] Snyder *v.* Blair, 33 N. J. Eq. 208.
[3] Loeb *v.* Willis, 22 Hun (N. Y.), 508.
[4] Haldane *v.* Sweet, 58 Mich. 429.
[5] Sebring *v.* Conkling, 32 N. J. Eq. 24.
[6] Kortright *v.* Smith, 3 Edw. (N. Y.) 402.

A partner may properly insist that a mortgage of partnership property to secure a partnership debt shall be foreclosed before a personal judgment is rendered against him on the note.[1]

Upon the same principle it has been held that a defendant who is only secondarily liable may require the bringing in of the principal debtor, if within the jurisdiction of the court, for the purpose of obtaining against him a judgment for deficiency.[2]

When a judgment is rendered against several persons, some of whom are primarily liable and others only secondarily, the judgment for the deficiency should provide that it be enforced in the first place against the principal debtors, and then, so far as it remains unsatisfied only, against the sureties in the order of their liability, which should also be fixed.[3] The decree for deficiency should determine the order of liability of several grantees who have successively assumed the payment of the mortgage debt.[4]

The liability of the payee of a note, who indorses it and gives a mortgage conditioned for its payment according to its tenor, is regarded as primary, and not merely that of an indorser.[5]

1710. Third persons liable for the mortgage debt may be joined as defendants.[6] The codes of these and other states provide that the plaintiff may unite in the same complaint several causes of action belonging to one class of actions, as, for instance, such as arise out of the same transaction, or transactions connected with the same subject of action; but with the qualification that the causes of action so united must all affect all the parties to the action. In the states above named an exception is made in actions for the foreclosure of mortgages. It is generally considered that without this exception and a special provision for this case, the holder of a mortgage could not join a third party liable for the debt with the mortgagor in an action of foreclosure, for the purpose of obtaining a judgment for a deficiency against him. An action against the mortgagor alone in which a decree is sought for the sale of the property, and as well a judgment against him for a deficiency, would not embrace different causes

[1] Warren *v.* Hayzlett, 45 Iowa, 234.

[2] Bigelow *v.* Bush, 6 Paige (N. Y.), 343.

[3] Luce *v.* Hinds, Clarke (N. Y.), 453; Leonard *v.* Morris, 9 Paige (N. Y.), 90; and see Jones *v.* Steinbergh, 1 Barb. (N. Y.) Ch. 250; Farnham *v.* Mallory, 5 Abb. N. S. (N. Y.) Pr. 380.

[4] Youngs *v.* Public Schools, 31 N. J. Eq. 290.

[5] Robertson *v.* Cauble, 57 Ind. 420; Zekind *v.* Newkirk, 12 Ind. 544.

[6] See statutes of the several states, §§ 1317–1366; also Palmeter *v.* Carey, 63 Wis. 426.

of action, but different remedies for the same cause; but when a third person is joined for the purpose of obtaining a judgment against him for a deficiency, it is considered, in the absence of such express provision, that there is a misjoinder of causes of action. This seems to be the distinction established by the authorities. When, therefore, the code of a state does not contain such express provision, a judgment for a deficiency cannot be obtained against any persons liable for the debt other than the mortgagor himself.[1] The only remedy against a third person liable for the mortgage debt is by a separate action after the deficiency has been ascertained. Objection to a complaint which improperly joins these different causes of action must be taken by answer or demurrer, or it will be deemed to be waived;[2] and if there be no such objection, a judgment for the deficiency may be entered, though not expressly authorized by any statute.[3]

Mere delay on the part of the mortgagee to foreclose, when he had not been requested to do so, and the interest has been paid, does not render him liable for a loss occasioned by a fall in the market value of the property.[4] But if the delay has been great, and in the mean time interest and taxes have been allowed to accumulate to a large amount, and other persons personally bound for the deficiency have become insolvent and the property has greatly depreciated, an application for leave to sue at law for a deficiency after foreclosure, which by statute is addressed to the discretion of the court, will be denied.[5]

A personal judgment for a deficiency in a foreclosure suit may be had against one who in assigning a mortgage has made a guaranty of it.[6]

If judgment is prayed for against all the makers of a mortgage note, but judgment is entered by default against only one of them, the note is merged in the judgment, and the plaintiff cannot bring a subsequent action against the other makers.[7]

[1] Pomeroy's Remedies, § 459; Doan *v.* Holly, 26 Mo. 186; *S. C.* 25 Mo. 357; Faesi *v.* Goetz, 15 Wis. 231; Cary *v.* Wheeler, 14 Wis. 281; Jesup *v.* City Bank of Racine, 14 Wis. 331; Stilwell *v.* Kellogg, 14 Wis. 461; Borden *v.* Gilbert, 13 Wis. 670. See McCarthy *v.* Garraghty, 10 Ohio St. 438. It has been held, however, that a judgment may be rendered against a third party in the absence of an express prohibition. Hilton *v.* Otoe Co. Nat. Bank, 26 Fed. Rep. (Neb.) 202.

[2] Baird *v.* McConkey, 20 Wis. 297.

[3] Cary *v.* Wheeler, *supra.*

[4] Merchants' Ins. Co. *v.* Hinman, 34 Barb. (N. Y.) 410.

[5] Collins's Petition, 6 Abb. (N. Y.) N. C. 227.

[6] § 1432; Ofpeer *v.* Burchell (N. Y. Superior Ct. Jan. 1879), 19 Alb. L. J. 57.

[7] Lawrence *v.* Beecher (Ind.), 19 N. E. Rep. 143.

1711. A court of equity cannot, independent of any provision of statute giving the authority, decree the payment of the balance that may remain of the mortgage debt after applying the proceeds of the property mortgaged, unless the debt, without the mortgage, was such that a court of chancery would have jurisdiction of it and could enforce it.[1] A foreclosure in equity, though not a proceeding *in rem*, is in the nature of such a proceeding, and is not intended ordinarily to act *in personam*. Without the aid of statute or of circumstances giving equitable jurisdiction over the demand, the only proper remedy for the deficiency is by action at law upon the bond or note.[2] If, however, no note, or bond, or other legal obligation was given, or if this has been lost, the court may enforce the demand as an equitable one against the mortgagor by a personal decree for the balance remaining unsatisfied.[3] When the mortgaged premises have been sold to one subject to the mortgage, which he agrees to pay, his obligation enures in equity to the benefit of the holder of the mortgage, who is entitled upon foreclosure to a decree against such purchaser for any deficiency there may be after applying to the debt the proceeds of the sale. The right to such a decree is upon the ground that the claim is purely an equitable one.[4]

A court of equity, having obtained jurisdiction to foreclose a mortgage, may proceed to give a personal judgment on the indebtedness after the foreclosure has become impossible, the property having been exhausted by a prior mortgage.[5]

Generally as already stated there are statutes giving authority to render judgments for the deficiency not only against the mortgagor, but also against any other person who has assumed the payment of the debt, or who has become a guarantor or surety

[1] Fleming *v.* Sitton, 1 Dev. & Bat. (N. C.) Eq. 621; Morgan *v.* Wilkins, 6 J. J. Marsh. (Ky.) 28; McGee *v.* Davie, 4 Ib. 70; Dunkley *v.* Van Buren, 3 Johns. (N. Y.) Ch. 330; Hunt *v.* Lewin, 4 Stew. & Port. (Ala.) 138; Downing *v.* Palmateer, 1 T. B. Mon. (Ky.) 64; Stark *v.* Mercer, 4 Miss. (3 How.) 377; Orchard *v.* Hughes, 1 Wall. 73.

[2] In South Carolina a practice grew up in the equity courts of rendering a decree for the deficiency, though this was "confessedly a departure from the procedure of the English Chancery." Wightman *v.* Gray, 10 Rich. (S. C.) Eq. 518.

[3] Crutchfield *v.* Coke, 6 J. J. Marsh. (Ky.) 89; Waddell *v.* Hewitt, 2 Ired. (N. C.) Eq. 252.

[4] Halsey *v.* Reed, 9 Paige (N. Y.), 446; Klapworth *v.* Dressler, 13 N. J. Eq. 62; Hoy *v.* Bramhall, 19 N. J. Eq. 563. By a subsequent statute (Nix. Dig. p. 119) of 1866, the power of the court in such cases is recognized and extended. See, also, Stiger *v.* Mahone, 24 N. J. Eq. 426.

[5] Hayden *v.* Snow, 9 Biss. 511.

of it,[1] or has made any collateral undertaking for the payment of it.[2]

Any defence which prevails against a general decree of foreclosure will generally be equally good against a personal decree for the debt; and there may be defences to the latter which are not good against the former.[3]

1712. One who has bought subject to the debt merely is not liable for it. A decree for the deficiency cannot be rendered against a subsequent purchaser or mortgagee unless he has assumed the payment of the mortgage debt.[4] Whether a personal responsibility is assumed is in all cases a question of intention, and unless the parties have declared this intention by words appropriate and sufficient to express it, there can be no such liability. If the deed simply says the land is subject to a certain mortgage, then the cases all agree that the purchaser is not personally bound to pay it.[5] The addition of the further words, "which has been estimated as a part of the consideration money of this conveyance, and has been deducted therefrom," does not import anything more.[6]

A decree which finds the sum due on the mortgage, and requires a subsequent purchaser to pay the same by a day named, and if he does not, that the mortgaged premises be sold, is not a personal decree against the purchaser, but an alternative one, giving him the option to pay the money or suffer the property to be sold.[7]

The mortgagee's right to proceed in equity against one who has assumed to pay his mortgage, does not embrace a claim to the purchase money on a sale of the mortgaged premises by the owner.[8]

1713. If there are words in the deed importing that the grantee is to pay the mortgage to which the land is subject, he is deemed to have entered into an express undertaking to do so by the mere acceptance of the deed without having signed it. No precise or formal words are necessary. If they show an inten-

[1] Jarman *v.* Wiswall, 24 N. J. Eq. 267; Bristol *v.* Morgan, 3 Edw. (N. Y.) Ch. 142; Jones *v.* Stienbergh, 1 Barb. Ch. 250; Sauer *v.* Steinbauer, 14 Wis. 70.

[2] Curtis *v.* Tyler, 9 Paige (N. Y.), 432.

[3] As where the mortgage is void for usury. Mann *v.* Cooper, 1 Barb. (N. Y.) Ch. 185.

[4] §§ 735-738; Mount *v.* Potts, 23 N. J. Eq. 188; Emley *v.* Mount, 32 N. J. Eq. 470.

[5] Hull *v.* Alexander, 26 Iowa, 569.

[6] Belmont *v.* Coman, 22 N. Y. 438.

[7] Gochenour *v.* Mowry, 33 Ill. 331; Glover *v.* Benjamin, 73 Ill. 42.

[8] Emley *v.* Mount, *supra*.

tion that the grantee shall pay the debt, he thereby becomes personally liable for it;[1] and his liability may be enforced in a foreclosure suit by a judgment for a deficiency.[2] If the agreement to pay the debt is not contained in the deed to the purchaser, it must be evidenced by some writing and supported by a good consideration.

When such grantee is not made a party to the foreclosure suit, and a judgment for a deficiency is recovered against the grantor, he is entitled to recover the same, with costs of foreclosure of the grantee, in a suit at law. A statute such as exists in New York,[3] prohibiting proceedings at law without leave of court for the recovery of the debt after a decree has been entered in a suit to foreclose the mortgage, has no application to such a suit by the grantor. It applies only to a suit by the holder of the mortgage.[4]

If a mortgagee, upon assigning the mortgage, has guaranteed the payment of it, the amount of his liability, in case he has received less than the face of the mortgage, may be limited to the amount he received, with interest.[5]

If the grantee upon purchasing a part of the mortgaged premises assumes a certain part of the mortgage debt, his liability is limited to the sum assumed. If upon a subsequent foreclosure of the mortgage he purchases the same part of the premises already conveyed to him, the mortgagee can claim of him as a deficiency only the difference between the sum assumed by him, with interest thereon from the date at which this part of the mortgage became primarily his own debt, and the like sum paid by him at the foreclosure sale.[6]

1714. Though the conveyance was merely for security.— It does not matter, as regards the personal liability of one who has assumed to pay the mortgage, that he took the deed of the equity of redemption merely as security for an indebtedness owing to him by the firm of which the mortgagor was a member;[7]

[1] §§ 741, 748 *et seq;* Ricard *v.* Sanderson, 41 N. Y. 179; Belmont *v.* Coman, 22 N. Y. 438; Trotter *v.* Hughes, 12 N. Y. 74; Vail *v.* Foster, 4 N. Y. 312; Curtis *v.* Tyler, 9 Paige (N. Y.), 432; Halsey *v.* Reed, Ib. 446; Marsh *v.* Pike, 10 Ib. 595; Blyer *v.* Monholland, 2 Sandf. (N. Y.) Ch. 478; Lawrence *v.* Fox, 20 N. Y. 268; Miller *v.* Thompson, 34 Mich. 10.

[2] Palmeter *v.* Carey, 63 Wis. 426.

[3] 2 R. S. 191, § 155.

[4] Campbell *v.* Smith, 71 N. Y. 26; Comstock *v.* Drohan, 71 N. Y. 9; *S. C.* 8 Hun (N. Y.), 373.

[5] Goldsmith *v.* Brown, 35 Barb. (N. Y.) 484; Rapelye *v.* Anderson, 4 Hill (N. Y.) 472.

[6] New Jersey Sinking Fund Com'rs *v.* Peter, 32 N. J. Eq. 113.

[7] Ricard *v.* Sanderson, *supra;* and see Campbell *v.* Smith, 8 Hun (N. Y.), 6; *S. C.* 71 N. Y. 26.

though under other circumstances, when the conveyance was intended to operate merely as a mortgage, the reservation by the grantor of the right to pay the debt, and thereby discharge the obligation to pay the prior mortgage, has been held to be inconsistent with the idea that the assumption was for the benefit of the prior mortgagee.[1]

1715. If there be no bond, note, or other separate agreement in writing, or covenant in the mortgage for the payment of the mortgage debt,[2] or the mortgage secures the notes of third persons,[3] there can ordinarily be no personal judgment for any deficiency. But if the defendant appears in the action and consents to such a judgment, it is valid.[4] There can be no personal judgment in case the mortgagee has agreed with the mortgagor to give up the notes, and to look to the property only;[5] or has released the mortgagor from all personal liability;[6] or in case the debt is barred by the statute of limitations.[7]

When, however, the debt exists independently of the mortgage, though not evidenced by any writing, the deficiency not satisfied by a sale of the land may be recovered by action.[8]

The fact that the mortgagor has sold the property to another, who has agreed to pay the mortgage, does not prevent the entry of a deficiency decree against the mortgagor, unless the mortgagee has released him.[9]

But where there was an oral agreement between three persons to purchase certain real estate on joint account as a speculation, and to divide the profits in proportion to the amounts contributed, and the title was taken in the name of one of the partners, who personally gave his bond and mortgage to secure a portion of the purchase money, the holder of the mortgage was not allowed to recover judgment for a deficiency arising from a foreclosure sale against the other partners whose names did not appear upon the papers.[10]

In several states it is provided by statute that no mortgage shall be construed as implying a covenant for the payment of the

[1] § 757.

[2] §§ 72, 678, 750; Hunt *v.* Lewin, 4 Stew. & P. (Ala.), 138.

[3] Metz *v.* Todd, 36 Mich. 473.

[4] Fletcher *v.* Holmes, 25 Ind 458.

[5] Moore *v.* Reynolds, 1 Cal. 351.

[6] Brown *v.* Winter, 14 Cal. 31.

[7] Wiswell *v.* Baxter, 20 Wis. 680; Michigan Ins. Co. *v.* Brown, 11 Mich. 265.

[8] Savage *v.* Stone, 1 Utah T. 35.

[9] Connecticut Mut. L. Ins. Co. *v.* Tyler, 8 Biss. 369.

[10] Williams *v.* Gillies, 75 N. Y. 197; *S. C.* 8 N. Y. Weekly Dig. 12, reversing 13 Hun, 422; 53 How. Pr. 429.

sum intended to be secured; and when there is no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure the payment has been given, the remedies of the mortgagee are confined to the lands mentioned in the mortgage.[1]

1716. A judgment for a deficiency cannot be rendered against a non-resident who has not appeared nor been served with process within the state. The court in such case has no jurisdiction of the person, and the remedy is confined to a foreclosure and sale of the land.[2] When so provided by statute, a judgment obtained against a non-resident upon service by publication might be enforced against his property in the state.[3] Such a judgment would generally impose upon him no personal liability.

One who gives a mortgage to secure the payment of his own liabilities is personally and directly liable at law, and the demand may be enforced against him by suit in any jurisdiction where service can be had; but one who has only purchased mortgaged land subject to the incumbrance is not personally liable, though if he has promised to pay the mortgage he may be made a defendant in foreclosure if he can be found in the jurisdiction where the land lies, and a decree may be rendered against him for any deficiency after sale.[4]

[1] **California**: Code 1872, § 2928.

New York: 1 R. S. p. 738, § 139. This provision is construed not to mean that, in the absence of an express covenant or separate obligation for the payment of the debt, a personal action cannot be maintained for a mortgage debt when proved by competent evidence, whether in writing or parol; but that an action for a debt secured by mortgage cannot be sustained merely by the production of the mortgage, when it contains no express covenant to pay the debt." Demond *v.* Crary, 9 Fed. Rep. 750.

When the covenant does not amount to an express covenant to pay, no judgment for a deficiency can be had. Mack *v.* Austin, 95 N. Y. 513.

Indiana: Revision 1876, vol. 2, p. 261.

Michigan: 2 Comp. Laws of 1871, p. 1342.

Oregon: G. L. p. 516.

Wisconsin: R. S. 1871, p. 1143.

Wyoming Territory: Comp. Laws 1876, ch. 3, § 6.

Dakota Territory: Civil Code 1871, § 1624.

In **Tennessee** a personal decree for a deficiency is valid in such case. Taylor *v.* Rountree, 15 Lea, 725.

[2] Schwinger *v.* Hickok, 53 N. Y. 280; Lawrence *v.* Fellows, Walk. (Mich.) 468; see, also, Bartlett *v.* Spicer, 75 N. Y. 528.

[3] Martin *v.* Pond, 30 Fed. Rep. 15.

[4] Booth *v.* Conn. Mut. Life Ins. Co. 43 Mich. 299, 302, per Cooley, J.: "In order to enable the mortgagee to enforce any such equity against the purchasers, it is necessary that the purchasers and the land mortgaged be within the same jurisdiction. No personal decree can be made in one jurisdiction against parties not personally served or not submitting voluntarily by appearance. There is

1717. Upon the decease of the mortgagor, though the administrator or executor be a party to the bill, no binding judgment can be entered against him for any deficiency remaining after application of the proceeds of sale. A claim for the deficiency must be presented under the proceedings for the administration of the estate.[1] The suit can be prosecuted against the executor or administrator only for the purpose of reaching the property and subjecting it to sale, or for determining the amount of the deficiency. A judgment for deficiency may be essential as the basis of a subsequent proceeding to enforce payment from the estate.[2] "If the court can render a judgment and order execution against the property of the deceased in the hands of the administrator, the mortgagee first foreclosing would in effect get priority of payment out of the estate, not only as against general creditors, but as against all mortgagees later in foreclosing, though in the same class of creditors."[3]

Neither can a mortgagee in such case have his judgment declared a lien upon surplus money arising from the foreclosure of a mortgage upon other lands given by the deceased mortgagor to another mortgagor;[4] but where, as in New York, resort may be had to the heirs and devisees after failure to collect out of the personal estate, and where, too, a surplus is regarded as belonging to the heirs rather than the executor or administrator of a deceased mortgagor, an action may be maintained against the heirs or devisees, in which, if they are insolvent, the court may invest such surplus moneys to be held by the officer and applied in satisfaction of the judgment.[5]

No judgment can be had against a purchaser from the mort-

therefore in this case, where the purchasers of the land reside in Michigan and the land is in Illinois, neither a direct liability of the purchasers to the defendant, nor a contingent liability, except such as depends upon the voluntary action of the purchasers themselves. Whatever liability they may incur at some future time, when the incumbrances are foreclosed, by voluntarily going into the State of Illinois and submitting to the service of process there, none exists against them now, either presently or contingently, in this state."

[1] Pechaud *v.* Rinquet, 21 Cal. 76; Cowell *v.* Buckelew, 14 Cal. 640; Fallon *v.* Butler, 21 Cal. 24; Leonard *v.* Morris, 9 Paige (N. Y.), 90; Null *v.* Jones, 5 Neb. 500; *S. C.* 5 Neb. 57; Mut. Life Ins. Co. *v.* Howell, 32 N. J. Eq. 146.

[2] Lockwood *v.* Fawcett, 17 Hun (N. Y.), 146; Glacius *v.* Fagel, 88 N. Y. 434.

[3] Per Mr. Justice Perkins, in Newkirk *v.* Burson, 21 Ind. 129; and see Rhodes *v.* Evans, Clarke (N. Y.), 168. This is at any rate the rule before the expiration of the period limited for the settlement of the estates of deceased persons. Hathaway *v.* Lewis, 2 Disney (Ohio), 260.

[4] Fliess *v.* Buckley, 24 Hun (N. Y.), 514; *S. C.* 22 Ib. 551.

[5] Fliess *v.* Buckley, *supra.*

gagor unless he has assumed the payment of the debt.[1] Nor can such judgment be had against the heir or devisee of a deceased mortgagor,[2] without proof that he has voluntarily incurred a personal responsibility.[3]

1718. A personal judgment against the wife is erroneous when the mortgage was executed by her with the husband upon his own land to secure his own debt. She is properly made a party to the suit for the purpose of concluding her rights of dower, but is not a party in any other sense.[4] Before a judgment can be rendered against her on her bond or note made jointly with her husband, it must appear affirmatively from the allegations and evidence that the debt was her own proper debt, or related to her separate estate.[5] Neither can such a judgment be entered against a widow of the mortgagor, who with his heirs is made a party to the suit after his death;[6] nor against the heirs.[7] But if a married woman is herself one of the mortgage debtors, and the mortgage was for the benefit of her separate estate, and she is possessed of separate property other than that mortgaged, a personal judgment may properly be rendered against her for the deficiency.[8] But no obligation on her part can be implied from an agreement that certain lands conveyed by her husband and herself as security for his debt shall be reconveyed to her alone on repayment of the debt, although the agreement purports to make her liable for the advances; especially where by statute no covenant for the payment of the debt secured can be implied in a mortgage.[9]

A judgment against the husband, upon a joint note of himself and wife, does not merge the right to charge the wife's separate estate with the payment of the note, in a subsequent action

[1] Burkham *v.* Beaver, 17 Ind. 367; Carleton *v.* Byington, 24 Iowa, 172.

[2] Leonard *v.* Morris, 9 Paige (N. Y.), 90.

[3] Reinig *v.* Hecht, 38 Wis. 212.

[4] O'Brian *v.* Fry, 82 Ill. 274; Wright *v.* Langley, 36 Ill. 381; Key *v.* Addicks, 8 Ind. 521; Kirk *v.* Fort Wayne Gas Light Co. 13 Ind. 56; Patton *v.* Stewart, 19 Ind. 233; Emmett *v.* Yandes, 60 Ind. 548; Neitzel *v.* Hunter, 19 Kans. 221; Knox *v.* Moser, 69 Iowa, 341.

[5] § 111; Manhattan Life Ins. Co. *v.* Glover, 14 Hun (N. Y.), 153; Mack *v.* Austin, 29 Hun (N. Y.), 534; Avery *v.* Vansickle, 35 Ohio St. 270.

[6] Brown *v.* Orr, 29 Cal. 120; Pillow *v.* Sentelle (Ark.), 5 S. W. Rep. 783; Randall *v.* Bourquardez (Fla.), 2 So. Rep. 310.

[7] Alexander *v.* Frary, 9 Ind. 481.

[8] Merchants' Nat. Bank *v.* Raymond, 27 Wis. 567; Jones *v.* Merritt, 23 Hun (N. Y.), 184; Payne *v.* Burnham, 62 N Y. 69, 74.

[9] Howe *v.* Lemon, 37 Mich. 164

against her, especially if her obligation in such case be regarded not as a legal one, but merely an obligation enforcible in equity.[1]

1719. No judgment can be rendered for such parts of the debt as are not due. The court can only direct at what time and upon what default any subsequent judgment and execution may issue.[2] But if the mortgage provides that upon default in payment of any instalment of the mortgage debt, or of interest, the whole debt shall immediately become due and payable, a personal judgment may be entered for the whole debt upon a default in payment of the first instalment of principal or interest.[3]

1719 *a*. In ascertaining the amount of the deficiency unpaid taxes and assessments upon the property should be deducted from the proceeds of the sale. This is the rule even when it is sought to collect the deficiency from the mortgagor after he has conveyed the property subject to the mortgage which the grantee has assumed to pay, and such grantee has allowed the premises to become incumbered by taxes and assessments.[4] It is doubtful whether, in such case, a notice to the mortgagee and request, after the mortgage has fallen due, to foreclose it, would avail to impose upon him the damages resulting to the mortgagor from the accumulation of taxes and other liens upon the property. It seems probable that the mortgagor has no remedy except to protect himself by paying the mortgage debt, and becoming subrogated to the rights of the mortgagee.[5]

In rendering a judgment for a deficiency, the owner of the equity of redemption cannot be charged with rents and profits collected by him previous to the entry of the mortgagee or the appointment of a receiver, on the ground that having the possession with the rents and profits he should apply these to keeping down the taxes and interest on the mortgage.[6]

[1] Avery *v.* Vansickle, 35 Ohio St. 270.

[2] Danforth *v.* Coleman, 23 Wis. 528; Skelton *v.* Ward, 51 Ind. 46. The case of Allen *v.* Parker 11 Ind. 504, in which it was said that judgment might be rendered for the amount due, and to become due, is questioned in Thompson *v.* Davis, 29 Ind. 264; and the judgment spoken of was not a personal judgment, but one authorizing a sale. "It is only so far as the sale of the mortgaged premises is concerned, when the premises are indivisible, that the debt can be collected before it becomes due." Skelton *v.* Ward, *supra.*

[3] Darrow *v.* Scullin, 19 Kans. 57. But it is not an error of which the mortgagor can complain that judgment is rendered only upon the first instalment.

[4] Cornell *v.* Woodruff, 77 N. Y. 203; and see Fleishhauer *v.* Doellner, 9 Abb. (N. Y.) N. C. 372.

[5] Marshall *v.* Davies, 78 N. Y. 414.

[6] Argall *v.* Pitts, 78 N. Y. 239.

1720. When it becomes a lien. — The decree for a deficiency of proceeds does not have the force and effect of a judgment at law so as to become a lien until the deficiency is ascertained.[1] This deficiency can only be ascertained from the sale, and the judgment becomes a lien upon the other property of the debtor only from the time it is docketed.[2]

By the practice generally adopted, no further action by the court is necessary after the amount of the deficiency is reported, but the clerk may issue an execution for it without further order.[3] In some states the mortgagee may take a decree fixing the amount due, and directing a sale, and then, after the sale, apply for a further decree fixing the deficiency and granting an execution for this; or he may take a judgment at once for the whole amount due, from which the officer making the sale deducts the proceeds of it, and in that way ascertains the deficiency;[4] and no further proceedings are necessary on the part of the court to ascertain the deficiency.

Inasmuch as the personal decree and execution cannot precede a sale of the premises, where equity required that the remedy against the mortgagor upon his bond should be first exhausted, proceedings in the foreclosure suit were suspended, to give time for the plaintiff's bringing a suit at law upon the bond.[5]

When a mortgage upon a homestead is satisfied by a foreclosure sale and subsequent redemption by the mortgagor, the homestead rights again attach upon the property, and a judgment for a deficiency does not create any lien upon the property as against the homestead exemption.[6]

1721. The personal remedy may be enforced without foreclosure against one who has made himself personally liable for the payment of a mortgage debt, and even without joining the mortgagor as defendant.[7] A judgment rendered in a foreclosure

[1] Mutual Life Ins. Co. *v.* Southard, 25 N. J. Eq. 337; Mutual L. Ins. Co. *v.* Hopper (N. J.), 12 Atl. Rep. 528. See Fletcher *v.* Holmes, 25 Ind. 458.

[2] Cormerais *v.* Genella, 22 Cal. 116; Rollins *v.* Forbes, 10 Cal. 299; Rowe *v.* Table Mt. Water Co. Ib. 441.

[3] Baird *v.* McConkey, 20 Wis. 297. See Burdick *v.* Burdick, 20 Wis. 348. In Michigan the complainant may take out execution for the deficiency at any time within ten years. Wallace *v.* Field, 56 Mich. 3.

[4] Rowland *v.* Leiby, 14 Cal. 156; and see Creighton *v.* Hershfield, 2 Mont. 386.

[5] Vanderkemp *v.* Shelton, Clarke (N. Y.), 321.

[6] Martens *v.* Gilson, 13 Nev. 489; Hershey *v.* Dennis, 53 Cal. 77; Marlowe *v.* Benagh, 60 Ala. 323.

[7] Burr *v.* Beers, 24 N. Y. 178; Lawrence *v.* Fox, 20 N. Y. 268; Siewert *v.* Hamel, 33 Hun (N. Y.), 44.

suit against the mortgagor is competent evidence of the amount of the mortgage debt, and of the amount of the deficiency remaining after a sale of the property, in a separate suit by the mortgagor against one who assumed the debt and was not a party to the foreclosure suit.[1] But under the codes of some states, as, for instance, those of New York and Michigan, when the mortgagee has voluntarily refrained from asking in his foreclosure suit for a decree for any deficiency, or has voluntarily omitted to join one who had become liable for the debt, some satisfactory reason should be given for permitting him to institute a separate action at law for its recovery.[2] Such leave will not be granted when it appears that the deficiency has been created in part or wholly by interference of the holder of the mortgage to prevent others from bidding at the foreclosure sale.[3]

[1] Comstock *v.* Drohan, 8 Hun (N. Y.), 373; *S. C.* 71 N. Y. 9.

[2] **In New York**: 2 R. S. 191, § 155; Comstock *v.* Drohan, *supra*; Equitable Life Ins. Co. *v.* Stevens, 63 N. Y. 341; *In re* Collins, 17 Hun (N. Y.), 289. **Michigan**: Comp. Laws, § 5149; Innes *v.* Stewart, 36 Mich. 285. See § **1223**.

[3] Innes *v.* Stewart, *supra*.

CHAPTER XXXIX.

STATUTORY PROVISIONS RELATING TO POWER OF SALE MORTGAGES AND TRUST DEEDS.

I. Introductory, 1722.

II. Statutory provisions in the several states, 1723–1763.

I. *Introductory.*

1722. In England a mortgage is now considered incomplete without a power of sale; and in fact since Lord Cranworth's Act,[1] in 1860, all mortgages are in effect made power of sale mortgages; for this act provides that where money is secured by a deed of land or of any interest in it, the person to whom the money for the time being is payable shall, at any time after the expiration of one year from the time when the principal shall have become payable, or after any interest shall have been in arrear for six months, or after any omission to pay any premium on any insurance which ought to be paid by the person entitled to the property, shall have to the same extent as if conferred by the mortgagor: 1st. A power to sell the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make. 2d. A power to insure from loss by fire, and to add the premiums to the debt secured at the same rate of interest. 3d. A power to appoint or obtain the ap-

[1] 23 & 24 Vict. ch. 145. This act, it is said, has been of practical use only in some few cases, where the mortgage deed contained no power of sale; for a special power of sale is almost universally given by the deed, even since this act, for a more expeditious mode of obtaining the money is demanded. So far as the act was intended to shorten the mortgage deed, it has wholly failed. Greenwad's Prac. of Conveyancing, 55. It has been suggested that this failure of the statute is due in part to the intense caution and deep-rooted conservatism which is always found among conveyancers; although the fact, that deeds are charged for according to their length, is supposed by an English writer to have had something to do with the failure, not only of this provision, but of others made with the like intent to shorten papers used in conveyancing.

In a subsequent statute, 25 & 26 Vict. ch. 53, a power of sale intended to operate under the foregoing statute is given in a form of mortgage annexed to the act as follows: "C. D. shall have power to sell on default of payment of the principal or interest, or any part thereof respectively."

pointment of a receiver of the rents and profits.[1] No such sale can be made until after six months' notice in writing given to the person or one of the persons entitled to the property, or affixed on some conspicuous part of the property. The purchaser's title is not liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no notice had been given; but any person damnified by an unauthorized sale has his remedy in damages against the person selling. The person selling makes a deed to the purchaser, and gives a receipt for the money, which fully discharges him. The purchase money is applied to the payment of the expenses of sale, the interest and principal of the debt, and the surplus to the person entitled to the property sold.[2] The act also contains provisions for the appointment when necessary of a receiver, whose duties it declares. It makes every mortgage executed after the passing of the act a power of sale mortgage, unless the application of the act is expressly negatived by the deed itself.

The primary object of this statute was to provide a power of sale for all mortgages. A secondary object was to shorten the mortgage deed used in that country, but in this respect the statute has wholly failed. It has been of use in affording a power of sale in some few cases in which the mortgage deed contained no power of sale. The chief cause of the failure of the statute has been that it was not liberal enough in its provisions. A more expeditious mode of obtaining the money out of the mortgaged property is almost universally demanded, so that a special power of sale is almost always inserted in the deed. The general object of this statute cannot be too highly commended; and it is to be hoped that statutes in similar form, but more liberally framed, may be enacted in this country. A power provided by statute, while it would prevent the cumbering of the records with the elaborate provisions in common use for enforcing the security, would make securities more certain, and therefore more valuable to both parties; for the construction of such a power would soon be settled, and settled for the whole community. Some protection might be

[1] Where it is desired that the mortgagee shall not have all or any of the powers conferred by the act, it may be prevented by express declaration. Ib. § 32.

[2] It is to be observed that this statutory power does not protect the purchaser's title except in these two instances. The express powers usually inserted in mortgages are intended to protect the purchaser in all cases of unauthorized and irregular sales, if he buys in good faith and without knowledge of the improper or irregular exercise of the power. Fisher on Mort. p. 511.

afforded the mortgagor at the same time; but too much legislation in this respect would be much worse than none at all, for the efficacy and simplicity of this remedy might be easily destroyed. Even now in a few states the exercise of the power is so restricted and hedged about with provisions in regard to notice, the conduct of the sale, and redemption afterwards, that this remedy is only a little better, perhaps, than the cumbersome and expensive process by equitable suit.

The only states in which a statutory power of sale has been provided are Virginia and West Virginia. The statute is the same in both states, the latter state having adopted the statute of the former. This statute applies to trust deeds only, as this form of security has in those states wholly superseded the use of mortgages. It provides in a few simple terms for the sale of the property by the trustee, whenever, after default, the creditor may require it; and for the application of the proceeds to the payment of the debt, the compensation of the trustee, and the rendering of the surplus to the debtor. In its brevity and simplicity this statute is to be commended.

II. *Statutory Provisions in the several States.*

1723. Alabama. — The usual form of mortgage now used in Alabama contains a power of sale authorizing foreclosure without the intervention of a court, by publication of a notice. Deeds of trust are also in use. The power to sell is part of the security, and may be executed by any person who, by assignment or otherwise, becomes entitled to the money secured.[1] Property sold under a power is subject to redemption for two years, in the same way as when sold under decree of foreclosure in chancery.[2]

1723 *a*. Arizona Territory. — All sales of property made by the mortgagee or his legal representatives by virtue of a power of sale, or by the trustee named in a trust deed in pursuance of the provisions of such trust deed, are valid and binding on the mort-

[1] Code 1886, § 1844.

An administrator may sell under the power, though by its terms it runs only to the mortgagee, "his heirs and assigns." Lewis *v.* Wells, 50 Ala. 198.

[2] Code, 1886, §§ 2877–2889. A sale under a power regularly made cuts off the right of redemption, and leaves the mortgagor merely the right to redeem within two years, though no conveyance has been made. Mewburn *v.* Bass, 2 So. Rep. 520; Cooper *v.* Hornsby, 71 Ala. 62; Bailey *v.* Timberlake, 74 Ala. 221. This statutory right of redemption must be exercised within two years, and there is no exception in favor of persons under the disability of infancy, coverture, insanity, etc. Mewburn *v.* Bass, *supra*.

gagors and grantors, and all persons claiming under them, and foreclose all right and equity of redemption of the property so sold.[1]

1724. **Arkansas.** — Trust deeds are in use, and must be acknowledged and recorded the same as mortgages.

1725. **California.** — Neither power of sale mortgages nor trust deeds are in very general use in this state, although it is provided by statute that a power of sale may be conferred upon a mortgagee or other person.[2] A power of sale contained in the mortgage is merely a cumulative remedy, and does not in any way affect the right to foreclose in chancery.[3] The mortgagee has his election to foreclose in that way, or under the power of sale vested in him by the mortgage. The right to sell rests upon the contract of the mortgagor, and a sale fairly made passes a good title to the purchaser. It is provided that the power to sell is to be deemed a part of the security, and that it shall vest in and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid whenever the assignment is duly acknowledged and recorded.[4]

1726. **Colorado.**[5] — Power of sale mortgages and trust deeds are both in use.

1727. **Connecticut.** — Power of sale mortgages and trust deeds are not in general use.

1728. **Dakota Territory.**[6] — A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security. The power is a part of the security, and passes by an assignment. Such power of sale is a trust, and can be executed only in the manner prescribed. Before a foreclosure can

[1] R. S. 1887, § 2359. The power may be exercised on a default in payment of interest. Hooper *v.* Stump, 14 Pac. Rep. 799.

[2] Civil Code, § 2932. A trust deed is not a mortgage requiring a judicial foreclosure. Grant *v.* Burr, 54 Cal. 298.

[3] Fogarty *v.* Sawyer, 17 Cal. 589; Cormerais *v.* Genella, 22 Cal. 116. Whether a right of redemption exists after such sale was a question raised but not decided in the case of Cormerais *v.* Genella, *supra.*

[4] Civil Code, § 858; 1 Codes and Stats. 1876, §§ 5858, 5859.

[5] When a trust deed is foreclosed by action and sale under a decree, this must be the usual statutory decree giving a right of redemption, though if sale had been made under the power there would have been no redemption. Denver B. & M. Co. *v.* McAllister, 6 Colo. 261.

[6] Code of Civ. Pro. 1883, §§ 597–615. The statutory right of redemption applies to a trust deed or mortgage with power of sale. Kent *v.* Laffan, 2 Cal. 595; Levy *v.* Burkle, 14 Pac. Rep. 564.

be made by advertisement, a default must have occurred, and it is further requisite that there be no suit pending for the recovery of the debt; that any execution that may have been rendered shall have been returned unsatisfied; and that the mortgage and any assignment of it shall have been recorded. Each instalment of the mortgage is deemed to be a separate mortgage so far as to entitle the holder of it to a foreclosure.

Notice of the foreclosure sale must be given by publishing the same for six successive weeks, at least once in each week, in a newspaper of the county where the premises or some part of them are situated, if there be one; if not, then in the nearest paper published in the territory. The notice must specify the names of the mortgagor and mortgagee, and the assignee, if any; the date of the mortgage; the amount claimed to be due at the date of the notice; a description of the premises substantially as in the mortgage; and the time and place of sale.

The sale must be at public auction, between the hour of nine o'clock in the forenoon and the setting of the sun on that day, in the county in which the premises to be sold, or some part of them, are situated, and must be made by the person appointed for that purpose in the mortgage, or by the sheriff or deputy sheriff of the county, to the highest bidder.

The sale may be postponed by inserting a notice of the postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing this until the time of the postponed sale, at the expense of the party requesting the postponement. If the premises consist of distinct farms or lots, they must be sold separately, and no more can be sold than is sufficient to satisfy the amount due at the date of the notice of sale, with interest and costs. The mortgagee may fairly and in good faith purchase at the sale. The officer making the sale gives to the purchaser a certificate stating when he will be entitled to a deed if the premises are not redeemed.

Redemption may be made within one year after the sale by payment to the purchaser, if within the county, or otherwise to the officer who made the sale, of the amount for which the premises sold, together with interest at the rate of ten per cent. per annum from the time of sale. But the mortgagor is not entitled to retain possession of the premises after the sale. If not redeemed, the officer executes a deed of the premises to the pur-

chaser. Any surplus there may be must be paid over by the officer to the mortgagor, his representatives or assigns.

The evidence of the sale may be perpetuated by an affidavit of the publication of the notice made by the printer; an affidavit of the fact of sale, of the time and place of the sale, of the sum bid, and the name of the purchaser, made by the person who acted as auctioneer. Such affidavits are recorded in the registry of deeds for the county, and are presumptive evidence of the facts set forth.

The party foreclosing a mortgage by advertisement is entitled to his costs and disbursements out of the proceeds of sale, in addition to any attorney's fee agreed upon in the mortgage.

1729. **Delaware.** — Power of sale mortgages and trust deeds are not in general use.

1730. **District of Columbia.** — Deeds of trust with power of sale are in use to the exclusion, almost, of mortgages.

1731. **Florida.** — Neither of these instruments seems to be in general use.

1732. **Georgia.** — Mortgages with powers of sale are valid.[1]

1733. **Illinois.** — Prior to the act upon this subject passed in 1879, it was usual for mortgages to contain a power of sale; and trust deeds were generally preferred to mortgages. No sale could be made by virtue of a power in a mortgage or trust deed after the death of the owner of the equity of redemption; but foreclosure might be made in the same manner as of mortgages not containing a power of sale.

But in the year above named it was enacted that no real estate within this state shall be sold by virtue of any power of sale contained in any mortgage, trust deed, or other conveyance in the nature of a mortgage, executed after the taking effect of this act; but all such mortgages, trust deeds, or other conveyances in the nature of a mortgage, shall only be foreclosed in the manner provided for foreclosing mortgages containing no power of sale; and no real estate shall be sold to satisfy any such mortgage, trust deed, or other conveyance in the nature of a mortgage, except in pursuance of a judgment or decree of a court of competent jurisdiction.[2]

The statutes allowing redemption upon sale of mortgaged prem-

[1] Calloway *v.* People's Bank of Bellefontaine, 54 Ga. 441; Robenson *v.* Vason, 37 Ga. 66; McGuire *v.* Barker, 61 Ga. 339.

[2] Laws 1879, p. 211, § 1; Annotated Stats. 1885, ch. 95, § 17.

ises have no application to a sale under a trust deed or power in a mortgage.[1]

1734. Indiana. — Power of sale mortgages are not in use. They are not invalid by reason of the power, though they must be foreclosed in equity.[2] By authority given the mortgagee independent of the mortgage, he may act as the agent of the mortgagor in the sale of the premises.[3] Trust deeds are sometimes used, and sales by trustees under powers in such deeds are authorized by statute.[4]

1735. Iowa. — Deeds of trust and mortgages with powers of sale made since April 1, 1861, can be foreclosed only by action in court by equitable proceedings. Deeds of trust may be executed as securities, but are considered as, and foreclosed like, mortgages.[5]

1736. Kansas. — As mortgages can be foreclosed by suit only, powers of sale are of no practical advantage.[6] It is provided, however, that where a power to sell lands or other property shall be given to the grantee, in any mortgage or other conveyance intended to secure the payment of money, the power shall be deemed a part of the security, and shall vest in any person who shall become entitled to the money so secured to be paid.[7]

1737. Kentucky. — A power of sale mortgage or a trust deed must be enforced by a court of equity; but in making sale the court will follow the terms of the power.[8] A strict foreclosure is forbidden.[9]

1738. Louisiana. — Mortgages and deeds of trust with powers are not in use.

1739. Maine. — Power of sale mortgages are sometimes used, though trust deeds are not.

1740. Maryland.[10] — Power may be given to the mortgagee,

[1] Bloom *v.* Van Rensselaer, 15 Ill. 503; Fitch *v.* Wetherbee, 110 Ill. 475.

[2] R. S. 1888, § 1088; Rowe *v.* Beckett, 30 Ind. 154; Martin *v.* Reed, 30 Ind. 218.

[3] Farley *v.* Eller, 29 Ind. 322.

[4] 1 R. S. 1876, p. 915; Act of June 17, 1852.

[5] Code 1873, and R. Code 1880, § 3319. They were in use before that date. Pope *v.* Durant, 26 Iowa, 233; Crocker *v* Robertson, 8 Iowa, 404; Fanning *v.* Kerr, 7 Iowa, 450.

[6] Samuel *v.* Holladay, 1 Woolw. 400.

[7] Dassler's Stats. 1876, § 5631.

[8] Campbell *v.* Johnston, 4 Dana, 178.

[9] Civil Code 1876, § 375.

[10] R. Code 1878, art. 66, §§ 47–62.

These proceedings are under the general common law and chancery powers of the court, and are simply a summary mode of exercising an ordinary jurisdiction. Instead of a bill in equity for foreclosure, the agreement of the parties, as expressed in the power contained in the mortgage, is substituted for a decree of sale; and upon final ratification by the court of the report, the sale has all the

or any other person named in the deed,[1] to sell the mortgaged premises, upon the terms and contingencies expressed in the mortgage; and when the interests in any mortgage are held under one or more assignments, or otherwise, the power of sale therein contained shall be held divisible, and he or they holding any such interest who shall first institute proceedings to execute such power shall thereby acquire the exclusive right to sell the mortgaged premises.[2] Before making sale, however, the person authorized to sell must give bond to the state, in such penalty and security as shall be approved by the judge or clerk of a court of equity of the city or county in which the premises lie, to abide by and fulfil any order or decree which shall be made in relation to the sale, or the proceeds of it; which bond is for the security of all persons interested in the property or the proceeds of it.[3] Such notice of the sale shall be given as is provided for in the mortgage; or if there be no agreement as to notice, then the party offering the property for sale shall give twenty days' notice of the time, place, and terms, by advertisement in some newspaper printed in the county where the premises lie; or if there be no such newspaper, then in a newspaper having a large circulation in the county, and also by advertisement put up at the court-house door of said county.

All such sales must be reported under oath to the court, and there must be the same proceedings on such report as if the same

udicial sanction that it could have on formal proceedings in equity. Having jurisdiction independent of the statute, the court may decide upon every question which occurs in the cause, and its judgment is binding until reversed. A sale ratified by the court cannot be called in question in a collateral proceeding. Cockey *v.* Cole, 28 Md. 276, 285. In the city of Baltimore, under a public local law, a decree for sale may be in the first place obtained from the court of equity; and the sale is made by a trustee appointed by the court, after giving bond and advertising. He reports the sale to the court, and if everything is properly done an order is passed ratifying and confirming the sale. Code, vol. 2, p. 307. The validity of such sale may be inquired into at any time before the final order of confirmation is passed. Black *v.* Carroll, 24 Md. 251. In regard to foreclosure sales in the city of Baltimore, see Code of Public Local Laws, pp. 307–309.

[1] Under this and subsequent provisions a corporation cannot exercise a power of sale; especially as the depositary of the power must act under the responsibility of an oath. Therefore a power to a corporation or its attorney, without naming him, is void. Queen City Perpetual Building Asso. *v.* Price, 53 Md. 397.

The person who is to exercise the power must be named therein. The mortgagee cannot delegate the power. Frostburg Mut. Build. Asso. *v.* Lowdermilk, 50 Md. 175. See Lamm *v.* Port Deposit Homestead Asso. 49 Md. 233.

[2] Laws 1878, ch. 483.

[3] A bond filed on the day of sale is presumed to have been filed before the sale. Hubbard *v.* Jarrell, 23 Md. 66.

were made by a trustee under a decree of court, and the sale may be confirmed or set aside.[1] If set aside a resale may be ordered, and if justice requires it the court may appoint a trustee to sell the same.[2] The sale, when confirmed by the court and the purchase money is paid, passes all the title which the mortgagor had at the time of the recording of the mortgage.[3] Any person having an interest in the equity of redemption may apply to the court confirming the sale to have the surplus of the proceeds of sale, after payment of the mortgage debt and expenses, paid over to such person, or so much as will satisfy his claim, and the court distributes the surplus equitably among the claimants. After the sale has been confirmed, the person making the sale conveys to the purchaser,[4] or, if the vendor and purchaser be the same person, the court, in its order confirming the sale, appoints a trustee to convey the property to the purchaser on the payment of the purchase money. The mortgagee, or his assignee or legal representatives, may purchase at the sale. All sales must be in the county or city where the premises are situated, and if in more than one county the sale may be made in either.[5] The purchaser on the confirmation of the sale may have a writ of possession against the mortgagor. On the death of the mortgagee his in-

[1] The proper time to take advantage of any failure to comply with the law is when the sale is reported. Gayle *v.* Fattle, 14 Md. 69. When the sale is confirmed it has all the judicial sanction that it could have if it had been made by virtue of an ordinary decree, and cannot be called in question in any collateral proceeding. Cockey *v.* Cole, 28 Md. 276, 285; Morrill *v.* Gelston, 34 Md. 413.

[2] No order for a resale should be made without notice to the first purchaser. Schaefer *v.* O'Brien, 49 Md. 253.

[3] "The object of this provision of the Code was to confer upon courts the same jurisdiction, and to direct that the same proceedings should be had, in sales made under a power in a mortgage, as if such sales had been made under a decree of the court. Parties in interest may of course come in, and object to the ratification of the sale, but such objections must be as to the mode and manner of the sale, and not to the proceedings under which the property was sold. A party has no right to except to the ratification of sale on the ground that the mortgage or debt upon which the decree was passed was fraudulent." Patapsco Guano Co. *v.* Elder, 53 Md. 463, 465.

[4] When the decree provides for a credit as to part of the purchase money, and the sale is made on credit and confirmed, but the purchaser waives the credit and pays the whole purchase money at once, no objection can be made that the deed is executed forthwith, before the expiration of the term of credit. Morrill *v.* Gelston, *supra.*

[5] A power cannot be given to sell outside the county in which the premises are situate. Webb *v.* Haeffer, 53 Md. 187.

The prohibition does not apply to deeds of trust, but only to technical mortgages. Harrison *v.* Annapolis & Elk Ridge R. R. Co. 50 Md. 400.

terest vests in his executor or administrator, who may release in the same manner as the mortgagee could.

1741. **Massachusetts.** — Mortgages with powers of sale are almost exclusively used in this state. When a power of sale is contained in a mortgage and a conditional judgment has been entered the demandant may, instead of a writ of possession, have a decree entered that the property be sold pursuant to such power of sale.[1] The party selling must within ten days thereafter make a report under oath to the court, and the sale may be confirmed. But instead of such suit and decree the mortgagee or his assignee may give notice, and sell in accordance with the power;[2] and within thirty days after selling he must file a copy of the notice, and his affidavit setting forth his acts in the premises fully and particularly, in the office of the registry of deeds in the county or district where the property is situated.[3] If it appears by such affidavit that he has in all respects complied with the requisitions of the power, the affidavit, or a certified copy of the record of it, is admitted as evidence that the power of sale was duly executed.[4]

All statutes authorizing administrators, guardians, and trustees to mortgage real estate are construed as authorizing the giving of a mortgage containing a power of sale.[5]

No sale under a power is valid and effectual to foreclose the mortgage unless previous notice of the sale shall have been published once a week, the first publication to be not less than twenty-one days before the day of sale, for three successive weeks, in some newspaper, if there be any, published in the city or town where the mortgaged premises are situated, and if no newspaper is published in such city or town, then in some newspaper published in the county where the mortgaged premises are situated; but this requirement does not avoid the necessity of also giving notice of such sale in accordance with the terms of the mortgage.[6]

[1] P. S. 1882, ch. 181, §§ 14–18; G. S. ch. 140, §§ 38–44; and see St. 1868, ch. 197. Trust deeds are very seldom used.

[2] This is the usual mode of proceeding; a suit and decree being very rare when there is a valid power of sale.

[3] The affidavit need not allege the rendering of an account, nor the disposition made of the purchase money. Childs *v.* Dolan, 5 Allen, 319.

[4] This provision respecting the record of an affidavit of the sale is held to be merely directory, and a sale is good, and the title valid, if no affidavit is ever made or recorded. Learned *v.* Foster, 117 Mass. 365; Burns *v.* Thayer, 115 Mass. 89; Field *v.* Gooding, 106 Mass. 310.

[5] Stat. 1873, ch. 280; P. S. 1882, ch. 142, § 6.

[6] Acts 1877, ch. 215; P. S. 1882, ch. 181, § 17; Acts 1882, ch. 75.

When a mortgage is foreclosed by a sale under a power or otherwise, and the person having a valid title to the estate is kept out of possession by any person without right, he may recover possession by the summary process provided for the recovery of lands unlawfully held by tenants.[1]

In a case in Massachusetts, decided in 1858, it was held that an agreement to give a mortgage does not require the giving of a mortgage with a power of sale, because such power was declared not to be an ordinary accompaniment of a mortgage.[2] But since the time of this decision this form of mortgage has come to be used almost to the complete exclusion of any other, and it seems doubtful at least whether this decision would hold good at the present time. There is no reason now, it would seem, why a power of sale should not be regarded here, as in England, a necessary incident to a mortgage; and that an agreement to give a mortgage, or a power by will or otherwise to raise money by a mortgage, implies the giving of a mortgage with a power of sale.

1742. Michigan.[3] — A mortgage containing a power of sale upon default may be foreclosed by advertisement.[4] To entitle the party to give notice and to make such foreclosure, it is requisite: 1st. That some default shall have occurred; 2d. That no suit shall have been instituted at law to recover the debt or any part of it, or, if instituted, that it has been discontinued, or that execution has been returned unsatisfied in whole or in part;[5] and 3d. That the mortgage has been duly recorded, as well as any assignment of it; 4th. If given to secure the payment of money by instalments, each instalment after the first is deemed a separate

[1] Acts 1879, ch. 237; P. S. 1882, ch. 175, §§ 1-10. But a grantee of the purchaser cannot recover possession of the land by this process. Warren *v.* James, 130 Mass. 540.

This statute is ancillary to and a part of the process of foreclosure, and the use of the process must be limited to the mortgagee and to the purchaser at the foreclosure sale.

[2] Brayton *v.* N. E. Coal Mining Co. 11 Gray, 493. And see Platt *v.* McClure, 3 Woodb. & M. 151.

[3] Annotated Stats. 1882, §§ 8497-8515. Trust deeds in the nature of mortgages seem not to be in use.

The statutory foreclosure is not adapted to cases where there are conflicting equities which can only be worked out and protected in a court of chancery. Olcott *v.* Crittenden, 36 N. W. Rep. 41.

[4] Foreclosure by advertisement is not a judicial proceeding, but an act of the mortgagee, and cannot take place unless the mortgage contains a power of sale. Hebert *v.* Bulte, 42 Mich. 489.

[5] This refers to suits on the debt, and not to previous foreclosure proceedings. Lee *v.* Clary, 38 Mich. 223. Proving the mortgage debt before commissioners of the estate of a deceased mortgagor is not a proceeding at law within this prohibition. Larzelere *v.* Starkweather, 38 Mich. 96.

and independent mortgage, and may be foreclosed for each instalment in the same manner, and with like effect, as if given for each separate instalment.[1]

Notice is given by publishing the same for twelve successive weeks,[2] at least once in each week, in a newspaper printed in the county where the premises, or some part of them, are situated, if there be one; and if no newspaper be printed in such county, then such notice shall be published in a paper printed nearest thereto. The notice must specify: 1st. The names of the mortgagor and of the mortgagee, and assignee, if any; 2d. The date of the mortgage, and when recorded; 3d. The amount claimed to be due at the date of the notice; and 4th. A description of the mortgaged premises, conforming substantially with that contained in the mortgage.

The sale must be at public vendue, between the hour of nine o'clock in the forenoon and the setting of the sun, at the place of holding the circuit court within the county in which the premises to be sold, or some part of them, are situated, and must be made by the person appointed for that purpose in the mortgage, or by the sheriff, under-sheriff, or a deputy sheriff of the county, to the highest bidder. The sale may be postponed from time to time, by inserting a notice of such postponement as soon as practicable in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale is postponed, at the expense of the party requesting such postponement. If the premises consist of different farms, tracts,

[1] Formerly a foreclosure under a power of sale for one instalment forever discharged the land of the mortgage. Kimmell *v.* Willard, 1 Doug. 217. Now under the statute one instalment, by reason of falling due sooner, has no preference over the others. All the instalments stand upon the same basis, in like manner as several mortgages given at the same time, and it makes no difference whether they are all owned together or by different parties. If the sale be expressly made subject to the other instalments, the effect is to charge the land in the hands of the purchaser with the payment of these; but if not so made, though the sale may bar the equity of redemption of the mortgagor and subsequent purchasers, it only transfers to the purchaser one instalment of the mortgage and leaves the others unaffected. There is no redemption by one as against the other. McCurdy *v.* Clark, 27 Mich. 445; Bridgman *v.* Johnson, 44 Mich. 491. If the foreclosure sale be made for an instalment of interest or of principal, the sale should be made expressly subject to the principal debt or other instalments of the principal. Miles *v.* Skinner, 42 Mich. 181.

[2] Only twelve weeks' interval can be required between the publication of the notice and the sale itself. In computing the time, the day of the first publication should be excluded and the day of sale included. Gantz *v.* Toles, 40 Mich. 725.

or lots, not occupied as one parcel, they must be sold separately, and no more can be sold than may be necessary to satisfy the amount due on the mortgage at the date of the notice of sale, with interest, and the costs and expenses allowed by law.[1] But if distinct lots be occupied as one parcel, they may in such case be sold together.[2] The mortgagee, his assigns, or his or their legal representatives, may fairly and in good faith purchase the premises so advertised, or any part thereof, at such sale. The officer or person making the sale must forthwith execute and deliver to the purchaser a deed of the premises, specifying the precise amount for which such parcel was sold, and must indorse thereon the time when such deed will become operative in case the premises are not redeemed according to law, and must deposit the same with the register of deeds of the county in which the land is situated, as soon as practicable and within twenty days after such sale.[3]

Unless the premises are redeemed within the time limited for such redemption, as hereinafter provided, such deed thereupon becomes operative and may be recorded, together with any memorandum of cancelment of a portion of the same which may have been entered thereon by the register, and vests in the grantee all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or any time thereafter, except as to any parcels redeemed; but prior liens are not in any way prejudiced or affected. The premises may be redeemed within one year from the time of the sale, by paying to the purchaser or his assigns, or to the register of deeds, for the benefit of such purchaser, the sum which was bid, with interest from the time of the sale, at the rate per cent. borne by the mortgage, not exceeding ten per cent. per annum, whereupon the deed becomes void; but in case any distinct lot or parcel separately sold is redeemed, leaving a portion of the premises unredeemed, then the deed is inoperative merely as to the parcel or parcels so redeemed, and as to those not redeemed is valid. Upon the payment of the entire sum bid at the sale and interest to the register of deeds, or upon delivering to such register a certificate, signed and acknowl-

[1] The deed in such case must show the price of each parcel, and not one sum for all. Lee *v.* Mason, 10 Mich. 403.

[2] See Grover *v.* Fox, 36 Mich. 461.

[3] See Grover *v.* Fox, *supra.*

When the deed is filed immediately after sale, the year for redemption runs from the date of filing. Lilly *v.* Gibbs, 39 Mich. 394.

edged by the person entitled to receive the same, setting forth that such sum and interest have been paid, the register thereupon destroys the deed, and enters in the margin of the record of such mortgage a memorandum that the mortgage is satisfied; or, in case one or more parcels are redeemed, it is the duty of the register to enter upon the face of the deed a memorandum that the same is inoperative as to the parcels redeemed, and to enter in the margin of the record of the mortgage a memorandum that the same is satisfied as to the parcels redeemed. Any surplus must be paid to the mortgagor, his personal representatives or assigns, unless a claim for it shall have been filed with the officer, whereupon the officer is required to pay the surplus to the register of the circuit court in chancery for the county, and the claim is thereupon heard and adjudged in that court.[1]

Any party desiring to perpetuate the evidence of any sale may procure: 1st. An affidavit of the publication of the notice, to be made by the printer of the newspaper in which it was inserted, or by some one in his employ; 2d. An affidavit of the fact of sale by the auctioneer, stating the time and place of it, the sum bid, and the name of the purchaser. Such affidavits must be recorded; and the original affidavits or the record of them, and certified copies, are presumptive evidence of the facts therein contained.[2]

When any person continues in possession of any premises after the expiration of the time limited by law for redemption, summary proceedings may be had to recover possession.

1743. Minnesota.[3] — Every mortgage of real estate containing a power of sale, upon default being made, may be foreclosed by advertisement within fifteen years after the maturity of such mortgage or the debt secured. To entitle any party to make such foreclosure it is requisite: That some default in a condition of such mortgage has occurred, by which the power to sell has become operative; that no action or proceeding has been instituted at law to recover the debt then remaining secured by such mortgage or any part thereof, or, if the action or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned un-

[1] An attorney's fee is provided for by statute. Laws 1885, p. 133.

[2] An affidavit made seven or eight years after the sale is not such presumptive evidence. Mundy *v.* Monroe, 1 Mich. 68. Proof of sale is allowed to be recorded, but not required to be. Lee *v.* Clary, 38 Mich. 223.

[3] G. S. 1878, ch. 81, §§ 1–26; Supp. 1888, ch. 81, §§ 1–26 *a*. When land is in two counties, see Balme *v.* Wambaugh, 16 Minn. 116.

satisfied in whole or in part; that the mortgage containing such power of sale has been duly recorded,[1] and if it has been assigned, that all the assignments have been recorded. When a mortgage is given to secure the payment of money by instalments, each of the instalments, either of principal or interest, mentioned in such mortgage, may be taken and deemed to be a separate and independent mortgage; may be foreclosed in the same manner, and with like effect, as if such separate mortgage was given for each of such subsequent instalments; and a redemption of any such sale by the mortgagor has the like effect as if the sale for such instalment had been made upon an independent mortgage. In such case, if the mortgaged premises consist of separate and distinct farms or tracts, only such tract or tracts are sold as are sufficient to satisfy the instalment then due, with interest and costs of sale;[2] but if said premises do not consist of such separate and distinct farms or tracts, the whole is sold, and in either case the proceeds of such sale, after satisfying the interest or instalment of the principal due, with interest and costs of sale, must be applied towards the payment of the residue of the sum secured by said mortgage, and not due and payable at the time of such sale; and if such residue does not bear interest, such application is made with a rebate of the legal interest for the time during which the residue shall not be due and payable; and the surplus, if any, is paid to the mortgagor, his legal representatives or assigns.

Notice that such mortgage will be foreclosed by sale of the mortgaged premises, or some part of them, is given by publishing the same for six successive weeks, at least once in a week, in a newspaper printed and published in the county where the premises intended to be sold, or some part thereof, are situated, if there is one; if not, then in a newspaper printed and published in an adjoining county, if there is such a newspaper; if there is not, then in a newspaper printed and published in the county to which the county in which the premises are located is attached for judicial purposes, if there be such a newspaper; if there is

[1] Where the land is situated in two counties, but in recording it in one county the description of the land situated in the other county is omitted, such record is not sufficient to authorize a sale, in the county where such imperfect record was made, of the land situated in the other county, although the mortgage was duly recorded in such other county. Van Meter *v.* Knight, 32 Minn. 205.

[2] If the mortgage is in effect a separate mortgage upon several separate tracts to secure distinct sums, though consolidated in one writing, a sale of all the tracts together for a gross sum is irregular. Hull *v.* King, 37 N. W. Rep. 792.

not, then in a newspaper printed and published at the capital of the state. In all cases a copy of such notice must be served, in like manner as a summons in civil actions in the district court, at least four weeks before the time of sale, on the person in possession of the mortgaged premises, if the same are actually occupied. Proof of such service may be made, certified, and recorded in the same manner as proof of publication of a notice of sale under a mortgage. Every notice must specify: the names of the mortgagor and of the mortgagee, and the assignee, if any; the date of the mortgage, and when and where recorded;[1] the amount claimed to be due thereon, and taxes, if any, paid by the mortgagee at the date of the notice; a description of the mortgaged premises, conforming substantially to that contained in the mortgage; the time and place of sale. The sale is at public vendue, between the hour of nine o'clock in the forenoon and the setting of the sun, in the county in which the premises to be sold, or some part thereof, are situated, and is made by the sheriff of said county, or his deputy, to the highest bidder. Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale is postponed, at the expense of the party requesting such postponement. If the mortgaged premises consist of separate and distinct farms or tracts, they must be sold separately, and no more farms or tracts shall be sold than are necessary to satisfy the amount due on such mortgage at the date of notice of such sale, with interest, taxes paid, and costs of sale. The mortgagee, his assignee, or his or their legal representatives, may fairly and in good faith purchase the premises so advertised, or any part thereof, at such sale. The officer is required to make and deliver to the purchaser a certificate, under his hand and seal, containing a description of the mortgage under which such sale is made; a description of the real property sold; the price paid for each parcel sold separately; the date of the sale and the name of the purchaser, and the time allowed by law for redemption.[2] Said certificate must be executed, proved, or acknowledged, and recorded as required by law for a conveyance of real estate, within twenty days after such sale. Such certificate, so proved, acknowledged, and recorded, upon the expiration of the time for redemp-

[1] Martin *v.* Baldwin, 30 Minn. 537.

[2] As to what is sufficient in regard to stating the time of redemption, see Wells *v.* Atkinson, 24 Minn. 161.

tion, operates as a conveyance to the purchaser or his assignee of all the right, title, and interest of the mortgagor in and to the premises named therein, at the date of such mortgage, without any other conveyance whatever.[1]

The mortgagor, his heirs, executors, administrators, or assigns, whose real property is sold, may, within twelve months after such sale, redeem such property, as hereinafter provided, by paying the sum of money for which the same was sold, together with interest on the same from the time of such sale.[2] No redemption can be made for real property sold when the mortgage foreclosed contains a distinct rate of interest, more than seven per cent. per annum, unless the party entitled to redeem shall pay, within the time provided, the sum for which said property was sold, together with interest thereon from date of sale to the time of redemption, at the rate specified in the mortgage, not to exceed ten per cent. per annum. When no rate of interest is specified in the mortgage, the rate of interest after sale is seven per cent. per annum on the amount for which the property was sold.[3]

Redemption is made as follows: The person desiring to redeem is required to pay to the person holding the right acquired under such sale, or for him to the sheriff who made the sale, or his successor in office, the amount required by law for such redemption, and to produce to such person or officer a certified copy of the docket of the judgment, or the deed of conveyance or mortgage, or of the record or files, evidencing any other

[1] The sheriff's certificate of any sale shall be *primâ facie* evidence that all the requirements of law in that behalf have been duly complied with, and *primâ facie* evidence of title in fee thereunder in the purchaser at such sale, his heirs or assigns, after the time for redemption therefrom has expired; and no such sale shall be held invalid or set aside by reason of any defect in the notice thereof, or in the publication or posting of such notice, or in the proceedings of the officer making such sale, unless the action in which the validity of such sale shall be called in question be commenced, or the defence alleging its invalidity be interposed, within five years after the date of such sale: provided, that persons under disability to sue may commence such action or interpose such defence at any time within five years after the removal of such disability: provided, further, that such actions shall be commenced with reasonable diligence in all cases. 2 R. S. Supp. 1888, ch. 81, § 26 *a*. See Smith *v.* Buse, 35 Minn. 234.

[2] If the mortgage be foreclosed for more than is actually due, the court may, upon a proper showing, allow the mortgagor to redeem on paying what was justly due; but he must show an excuse for not applying to the court before foreclosure to prevent a sale for more than was due. Dickerson *v.* Hayes, 26 Minn. 100.

A junior mortgagee is not an "assign" who is entitled to redeem within the year. Cuilerier *v.* Brunelle, 33 N. W. Rep. 123.

[3] Redemption after sale can be exercised only as prescribed by statute. Dickerson *v.* Hayes, *supra*.

lien under which he claims a right to redeem, certified by the officer in whose custody such docket, record, or files shall be; any assignment necessary to establish his claim, verified by the affidavit of himself or the subscribing witness thereto, or of some person acquainted with the signature of the assignor; and an affidavit of himself or his agent, showing the amount then actually due on his lien.[1] The person or officer from whom such redemption is made is required to make and deliver to the person redeeming a certificate under his hand and seal, containing: the name of the person redeeming, and the amount paid by him on such redemption; a description of the sale for which such redemption is made, and of the property redeemed; and stating upon what claim such redemption is made; and if upon a lien, the amount claimed to be due thereon at the date of redemption. Such certificates must be executed and proved, or acknowledged and recorded, as provided by law for conveyances of real estate; and if not so recorded within ten days after such redemption, such redemption and certificate are void as against any person in good faith making redemption from the same person or lien. If such redemption is made by the owner of the property sold, his heirs or assigns, such redemption annuls the sale; if by a creditor holding a lien upon the property or any part thereof, said certificate, so executed and proved, or acknowledged and recorded, operates as an assignment to him of the right acquired under such sale, subject to such right of any other person to redeem as is or may be provided by law. If no such redemption is made, the senior creditor having a lien, legal or equitable, on the real estate, or some part thereof, subsequent to the mortgage, may redeem within five days after the expiration of the said twelve months; and each subsequent creditor, having such lien, within five days after the time allowed all prior lien-holders as aforesaid, may redeem by paying the amount aforesaid, and all liens prior to his own, held by the party from whom redemption is made. But no creditor is entitled to redeem unless, within the year allowed for

[1] Within twenty-four hours after such redemption is made, the party redeeming shall cause the documents, so required to be produced, to be filed in the office of the register of deeds of the county in which the mortgaged lands are situated, and the register of deeds shall indorse thereon the date and hour of receiving the same: provided, that in case such redemption shall be made at any place other than the county seat, it shall be deemed a sufficient compliance herewith to forthwith deposit such documents in the nearest post-office, addressed to such register of deeds, with the postage thereon prepaid. Supp. to Stats. 1888, ch. 81, § 14.

redemption, he files notice of his intention to redeem in the office of the register of deeds where the mortgage is recorded.

The interest acquired upon any such sale is subject to the lien of any attachment, or judgment duly made and docketed, against all persons holding the same, as in case of real property, and may be attached or sold on execution in the same manner. If, after sale of any real estate made as prescribed, there remains in the hands of the officer making the sale any surplus money after satisfying the mortgage on which such real estate was sold, and payment of the tax and cost of sale, the surplus is paid over by said officer, on demand, to the mortgagor, his legal representatives or assigns.[1] Any party desiring to perpetuate the evidence of any sale made may procure an affidavit of the publication of the notice of sale, and of any notice of postponement, to be made by the printer of the newspaper in which the same was inserted, or by some person in his employ knowing the facts; and an affidavit of the facts of any sale pursuant to such notice, to be made by the person who acted as an auctioneer in the sale, stating the time and place at which the same took place, the sum bid, and the name of the purchaser, which affidavit may be taken and certified to by any officer authorized by law to administer oaths. Such affidavit is recorded at length by the register of deeds of the county in which the premises are situated, in a book kept for the record of deeds; and such original affidavits, the record thereof, and certified copies of such record, are presumptive evidence of the facts therein contained. A record of the affidavits as above provided, and of the certificates executed on the sale of the premises, is sufficient to pass the title thereto, and the conveyance is an entire bar of all claims or equity of redemption of the mortgagor, his heirs and representatives, and of all persons claiming under him or them, by virtue of any title subsequent to such mortgage. Within ten days after foreclosure of any mortgage under the provisions of this act, the party foreclosing, or his attorney, must make and file with the register of deeds in the county where the property is located an affidavit of costs and disbursements, including attorney's fees embraced in the foreclosure sale, and that the same has been absolutely and unconditionally paid or incurred. The mortgagor, his heirs or assigns, at any time within one year after foreclosure, may recover from the

[1] A junior mortgagee is an "assign." 34 Minn, 545; 26 N. W. Rep. 907; Fuller v. Langum, 33 N. W. Rep. 122. Brown v. Crookston Agricultural Asso.

owner of the mortgage at the time of foreclosure three times the amount of any costs or disbursements not absolutely paid for said foreclosure, and three times the amount of any bonuses or interest over and above twelve per cent. embraced in such foreclosure, and for which the property was sold, unless said surplus has been paid to the mortgagor or his assigns.[1]

1744. Mississippi. — Power of sale mortgages and trust deeds are in use. At first it was thought that the power could not be exercised without the aid of a court of chancery;[2] but this aid was very soon dispensed with, and sales under the power held effectual to bar the equity of redemption.[3]

1745. Missouri. — A deed of trust is the usual form of giving security upon real estate; but a mortgage with a power of sale in the mortgagee or his agent is a form of security often used, and has been repeatedly recognized by the courts as valid. Such a power may be conferred upon a county as mortgagee, and may be enforced by it.[4] Deeds of trust in the nature of mortgages at the option of the *cestuis que trust*, their executors, or administrators, or assignees, may be foreclosed by them, and the property sold in the same manner, in all respects, as in the case of mortgages;[5] and all real estate which may be sold by the trustees, or any one representing them in any deed of trust, according to the terms of said deed, without the said deed of trust having been first foreclosed, and which shall be bought in at said sale by the *cestui que trust* or his assignee, or by any other person for them or either of them, shall be subject to redemption by the grantor in said deed, or his executors, administrators, or assigns, at any time within one year from the date of said sale, on payment of the debt and interest secured by said deed of trust, and all legal charges and costs incurred in making said sale up to the time of

[1] A mortgage containing a power of sale may be foreclosed conformably to the requirements of the statute, without regard to requirements of the power, that the mortgagee should enter and take possession of the premises before selling; that the sale should be on the premises; and that the mortgagee should furnish an account of the sale to the mortgagor. Butterfield *v.* Farnham, 19 Minn. 85. Whether the statute be imperative, so that a foreclosure is valid when conducted in accordance with the power, when this provides a different mode than that in the statute, the court do not decide in the case referred to. In **New York** a similar statute seems to have been held imperative. Lawrence *v.* Farmers' Loan & Trust Co. 13 N. Y. 200.

[2] Ford *v.* Russell, 1 Freem. (Miss.) Ch. 42.

[3] Sims *v.* Hundly, 3 Miss. (2 How.) 896.

[4] Mann *v.* Best, 62 Mo. 491, 495.

[5] 1 R. S. 1879, ch. 52, §§ 3298, 3299. "Deeds of trust as used in this state are of comparatively recent origin." McKnight *v.* Wimer, 38 Mo. 132.

redemption; and at such sale the purchaser shall receive a certificate of purchase, setting forth the property sold and amount of purchase money received, which certificate shall be delivered to the trustee, upon the application for a deed, at the expiration of twelve months. Security must be given to the satisfaction of the circuit court for the payment of the interest to accrue after the sale, and for all damages and waste that may be occasioned or permitted by the party whose property is sold.[1]

Mortgages with powers of sale in the mortgagee, and sales made in pursuance of them, are valid and binding upon the mortgagors, and all persons claiming under them, and forever foreclose all right and equity of redemption of the property sold.[2] Where a trustee in any deed of trust to secure the payment of a debt or other liability dies, resigns, or becomes disabled, the court, on application of any person interested in the debt stating the facts by his affidavit,[3] makes an order appointing the sheriff of the county trustee to execute the deed of trust in place of the original trustee, and he thereupon has all the rights and powers of such trustee, and may sell and convey the property according to the terms of the deed of trust and with the same effect.[4]

All sales of real estate under a power of sale contained in any mortgage or deed of trust shall be made in the county where the land to be sold is situated, and not less than twenty days' notice of such sale shall be given, whether so provided in such mortgage or deed of trust or not. Such notice shall set forth the date, and book, and page of the record of such mortgage or deed of trust, the grantors, the time, terms, and place of sale, and a description of the property to be sold; and shall be given by advertisement inserted for at least twenty times, and continued to the day of sale, in some daily newspaper in counties having cities of twenty thousand inhabitants or more, and in all other counties such notice shall be given by advertisement in some weekly news-

[1] The recitals in the trustee's or mortgagee's deed concerning the default, advertisement, sale, or receipt of the purchase money, and all other facts pertinent thereto, shall be received as *primâ facie* evidence in all courts of the truth thereof. Laws 1881, p. 171, § 1.

[2] 1 R. S. 1879, ch. 52, § 3310.

[3] The application and affidavit cannot be made by the maker of the deed. A debtor cannot foreclose his own mortgage. An appointment so made would be void. State *v.* Jackson, 51 Mo. 196.

[4] In such case, as the sheriff acts in his official capacity, he may sell by deputy. Tatum *v.* Holliday, 59 Mo. 422. See McKnight *v.* Wimer, 38 Mo. 132, for a provision in the deed to same effect as the statute. No notice to the grantor is necessary. Martin *v.* Paxson, 66 Mo. 260.

paper published in such county, for three successive weeks, the last insertion to be not more than one week prior to the day of sale; and if there be no newspaper published in such county or city, such notice shall be published in the nearest newspaper thereto in this state; but the giving of any shorter notice than that required by such mortgage or deed of trust is not authorized.[1]

1746. **Montana Territory.** — A power of sale in a mortgage or deed of trust is valid and may be exercised.[2]

1747. **Nebraska.** — Power of sale mortgages and trust deeds can be foreclosed only by action, as in the case of common mortgages.[3]

1748. **Nevada.** — Power of sale mortgages and trust deeds are not in use, as foreclosure must in all cases be by action and judicial sale.[4]

1749. **New Hampshire.** — Power of sale mortgages and trust deeds are seldom used.

1750. **New Jersey.** — Power of sale mortgages and trust deeds are unusual, but sales made by virtue of the powers in these instruments are fully sustained.[5]

1751. **New York.**[6] — A mortgage containing a power to the mortgagee or any other person to sell the mortgaged property, upon default, may be foreclosed in the manner hereafter prescribed where the following requisites concur: 1st. Default has been made in a condition of the mortgage whereby the power to sell has become operative. 2d. An action has not been brought to recover the debt secured by the mortgage or any part thereof;

[1] Laws 1885, p. 209.

[2] First Nat. Bank *v.* Bell S. & C. Min. Co. 19 Pac. Rep. 403.

[3] Webb *v.* Hoselton, 4 Neb. 308; Hurley *v.* Estes, 6 Neb. 386; Comstock *v.* Michael, 17 Neb. 288, 298; 22 N. W. Rep. 549; Wheeler *v.* Sexton, 34 Fed. Rep. 154.

[4] § 1348.

[5] Clark *v.* Condit, 18 N. J. Eq. 358.

[6] Code of Civil Procedure of 1880, §§ 2357–2400, 2424; Laws 1880, pp. 306–315.

These provisions do not apply to mortgages made upon real estate not situated in this state. So far as concerns the jurisdiction of this state, the parties may agree in such mortgages upon such terms of sale under the power as they please. Elliott *v.* Wood, 45 N. Y. 71; *S. C.* 53 Barb. 285.

To make a sale valid under the statute it must be strictly followed, as the effect of it is to deprive the holder of the equity of his title. Sherwood *v.* Reade, 7 Hill, 431, reversing *S. C.* 8 Paige, 633; Hubbell *v.* Sibley, 5 Lans. 51; Cohoes Co. *v.* Goss, 13 Barb. 137. If the power contains provisions inconsistent with statute, as by providing for a private sale, the statute regulations must be followed. Lawrence *v.* Farmers' Loan & Trust Co. 13 N. Y. 200. The proceedings must be had in the name of the actual holder of the mortgage. Cohoes Co. *v.* Goss, *supra.*

or, if such an action has been brought, it has been discontinued, or final judgment has been rendered therein against the plaintiff, or an execution issued upon a judgment rendered therein in favor of the plaintiff has been returned wholly or partly unsatisfied. 3d. The mortgage has been recorded in the proper book for recording mortgages in the county wherein the property is situated.[1]

The person entitled to execute the power of sale must give notice in the following manner that the mortgage will be foreclosed by a sale of the mortgaged property, or a part thereof, at a time and place specified in the notice: 1st. A copy of the notice must be published at least once in each of the twelve weeks[2] immediately preceding the day of sale, in a newspaper published in the county wherein the property to be sold, or a part thereof, is situated.[3] 2d. A copy of the notice must be fastened up, at least eighty-four days before the day of sale, in a conspicuous place at or near the entrance of the building where the county court of each county wherein the property to be sold is situated is directed to be held;[4] or, if there are two or more such buildings in the same county, then in a like place at or near the entrance of the building nearest to the property; or, in the city or county of New York, in a like place at or near the entrance of the building where the court of common pleas for that city and county is directed by law to be held. 3d. A copy of the notice must be delivered, at least eighty-four days before the day of sale, to the clerk of each county wherein the mortgaged property or any part thereof is situated. 4th. A copy of the notice must be served

[1] Where judgment was recovered on a debt payable by instalments, and execution was issued on the first instalment but afterwards satisfied, it was held that there could be no statute foreclosure on a second instalment for which no execution had been issued. Grosvenor *v.* Day, Clarke, 109.

If the premises are situate in more than one county the mortgage must be recorded in each. Wells *v.* Wells, 47 Barb. 416. The recording is for the benefit of the purchaser, and objection cannot be made by the mortgagor. Wilson *v.* Troup, 2 Cow. 195; Jackson *v.* Colden, 4 Cow. 266.

[2] A publication once in each week is sufficient, though the first publication is eighty-five days, and the last eight days, before the sale. Howard *v.* Hatch, 29 Barb. 297. If the first publication be defective, there may be a republication for the required time. Cole *v.* Moffitt, 20 Barb. 18. The publication is a good service upon an unknown party though an infant. Wheeler *v.* Scully, 50 N. Y. 667.

[3] In New York city, under authority of an act passed in 1874, ch. 656, the Daily Register has been designated by the judges of the courts of record as the paper in which legal notices are to be published.

[4] If the land lies in several counties, the notice must be posted in each county. Wells *v.* Wells, *supra*.

as prescribed in the next section upon the mortgagor, or, if he is dead, upon his executor or administrator.[1] A copy of the notice may also be served in like manner upon a subsequent grantee or mortgagee of the property, whose conveyance was recorded in the proper office for recording it in the county, at the time of the first publication of the notice of sale,[2] upon the wife or widow of the mortgagor, and the wife or widow of each subsequent grantee, whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgage;[3] or upon any person then having a lien upon the property subsequent to the mortgage by virtue of a judgment or decree duly docketed in the county clerk's office, and constituting a specific or general lien upon the property.[4] The notice specified in this section must be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case it may be subscribed by his attorney or agent.

Service of notice of the sale, as prescribed in subdivision fourth of the last section, must be made as follows: 1st. Upon the mortgagor, his wife, widow, executor, or administrator, or a subsequent grantee of the property whose conveyance is upon record, or his wife or widow, by delivering a copy of the notice, as pre-

[1] Notice should be given to the executor or administrator, not to the heirs or devisees. Anderson *v.* Austin, 34 Barb. 319; Low *v.* Purdy, 2 Lans. 422.

[2] An assignee of a junior mortgage is entitled to notice. Winslow *v.* McCall, 32 Barb. 241; Wetmore *v.* Roberts, 10 How. Pr. 51.

Only such mortgagees or assignees whose mortgages or assignments are recorded are entitled to notice. Decker *v.* Boice, 19 Hun, 152.

A party in interest who is not served with notice is not affected or barred by the sale. Wetmore *v.* Roberts, *supra;* Root *v.* Wheeler, 12 Abb. Pr. 294; Northrup *v.* Wheeler, 43 How. Pr. 122.

If the owner of the equity of redemption be not served with notice, *quære,* whether the foreclosure is not a nullity as to all parties. Mickles *v.* Dillaye, 15 Hun, 296. It is so as to the persons not served with notice. Raynor *v.* Raynor, 21 Hun, 36.

[3] In case the mortgage was executed by husband and wife, the notice of sale after the death of the husband must be served on the wife as surviving mortgagor; though not necessary to bar her dower in a purchase money mortgage. King *v.* Duntz, 11 Barb. 191; and see Brackett *v.* Baum, 50 N. Y. 8. "Personal representatives" means executors or administrators, and not heirs. Anderson *v.* Austin, *supra;* Low *v.* Purdy, *supra.*

[4] The lien of a judgment perfected after the first publication of notice, and before sale, is not cut off unless notice is served upon the judgment creditor as here provided. Groff *v.* Morehouse, 51 N. Y. 503. See, also, Klock *v.* Cronkhite, 1 Hill, 107; Winslow *v.* McCall, 32 Barb. 241. Though one judgment creditor has no notice, the sale is not therefore invalidated as to others who were served with notice. Hubbell *v.* Sibley, 5 Lans. 51.

scribed for delivery of a copy of a summons, in order to make personal service thereof upon the person to be served; or by leaving such a copy, addressed to the person to be served, at his dwelling-house, with a person of suitable age and discretion, at least fourteen days before the day of sale. If said mortgagor is a foreign corporation, or, being a natural person, he, or his wife, widow, executor, or administrator, or a subsequent grantee of the property whose conveyance is upon record, or his wife or widow, is not a resident of or within the state, then service thereof may be made upon them in like manner without the state at least twenty-eight days prior to the day of sale.[1] 2d. Upon any other person either in the same method, or by depositing a copy of the notice in the post-office,[2] properly inclosed in a postpaid wrapper, directed to the person to be served, at his place of residence, at least twenty-eight days before the day of sale.[3]

A county clerk, to whom a copy of a notice of sale is delivered as prescribed in subdivision third of the last section but one, must forthwith affix it in a book kept in his office for that purpose; must make and subscribe a minute, at the bottom of the copy, of the time when he received and affixed it; and must index the notice to the name of the mortgagor.

The notice of sale must specify:[4] 1st. The names of the mortgagor, of the mortgagee, and of each assignee of the mortgage. 2d. The date of the mortgage, and the time when, and the place

[1] Laws 1887, ch. 685, § 1.

[2] The notice may be mailed at any place in the state. Stanton *v.* Kline, 11 N. Y. 196; Bunce *v.* Reed, 16 Barb. 347. The twenty-eight days are to be counted from the time of deposit in the post-office, without reference to the mailing. Hornby *v.* Cramer, 12 How. Pr. 490. A mistake in addressing a party at a place other than his residence renders the sale void as to him. Robinson *v.* Ryan, 25 N. Y. 320.

[3] A notice addressed to A. B., administrator, is sufficient, without naming the estate of the deceased. George *v.* Arthur, 2 Hun, 406; *S. C.* 4 T. & C. 635. If it does not appear, except on information and belief, that the mortgagors resided at the place to which the notices were addressed and mailed, the proceedings are defective. Mowry *v.* Sanborn, 7 Hun (N. Y.), 380.

Notice to the heirs at law merely is insufficient. Van Schaack *v.* Saunders, 32 Hun (N. Y.), 515. Service upon one named in a will as executor is sufficient, though letters have not been issued to him. Van Schaack *v.* Saunders, *supra.*

The three modes of giving notice must be used together. If one of them be omitted the foreclosure is void. Cole *v.* Moffitt, 20 Barb. 18; Stanton *v.* Kline, 16 Barb. 9; King *v.* Duntz, 11 Barb. 191; Van Slyke *v.* Shelden, 9 Barb. 278; Low *v.* Purdy, 2 Lans. 422; Mowry *v.* Sanborn, 62 Barb. 223.

[4] It need not state that the mortgage will be foreclosed; Leet *v.* McMaster, 51 Barb. 236; or that the sale is for the purpose of foreclosure. Judd *v.* O'Brien, 21 N. Y. 186.

where, it is recorded.[1] 3d. The sum claimed to be due upon the mortgage at the time of the first publication of the notice;[2] and if any sum secured by the mortgage is not then due, the amount to become due thereupon. 4th. A description of the mortgaged property conforming substantially to that contained in the mortgage.[3]

The sale may be postponed from time to time. In that case a notice of the postponement must be published as soon as practicable thereafter in the newspaper in which the original notice was published; and the publication of the original notice, and of each notice of postponement, must be continued at least once in each week until the time to which the sale is finally postponed.[4]

The sale must be at public auction,[5] in the daytime, on a day other than Sunday or a public holiday, in the county in which the mortgaged property, or a part thereof, is situated; except that where the mortgage is to the people of the state, the sale may be made at the capitol. If the property consists of two or more distinct farms, tracts, or lots, they must be sold separately; and as many only of the distinct farms, tracts, or lots shall be sold as it is necessary to sell in order to satisfy the amount due at the time of the sale, and the costs and expenses allowed by law.[6] But where two or more buildings are situated upon the same city lot, and access to one is obtained through the other, they must be sold together.

[1] The place of record is sufficiently specified by stating the clerk's office and the date of record, though the number of the book in which it is recorded is erroneously stated. 5 Wait's Practice, 253; Judd *v.* O'Brien, 21 N. Y. 186, 188.

[2] A mistake as to the amount due does not invalidate the sale. Klock *v.* Cronkhite, 1 Hill, 107; Jencks *v.* Alexander, 11 Paige, 619; Bunce *v.* Reed, 16 Barb. 347; Mowry *v.* Sanborn, 62 Barb. 223.

If only a part of the debt is due, it is well to state both the amount due and the whole amount also. Jencks *v.* Alexander, 11 Paige, 619, 626.

[3] The statute does not require any reference in the notice of sale to incumbrances. If matters not called for by the statute are stated, which are calculated to mislead the public and prevent persons from bidding, the sale will be void; but if inserted by mistake merely, and a correction is published with the notice before it could be presumed that persons wishing to bid would be misled, the error would not vitiate the sale. Such an error was the statement of a prior incumbrance at twice its actual amount. Hubbell *v.* Sibley, 5 Lans. 51; and see Klock *v.* Cronkhite, *supra;* Burnet *v.* Denniston, 5 Johns. Ch. 35, 42. For form of notice, see 5 Wait's Prac. 254.

[4] It is not necessary to serve notice of postponement; the publication is sufficient. Westgate *v.* Handlin, 7 How. Pr. 372.

[5] A private sale, though expressly authorized by the mortgage, would not bar the equity of redemption. Lawrence *v.* Farmers' Loan & Trust Co. 13 N. Y. 200, 642.

[6] See Cox *v.* Wheeler, 7 Paige, 248.

The mortgagee, or his assignee, or the legal representative of either, may, fairly and in good faith, purchase the mortgaged property, or any part thereof, at the sale.

A sale made and conducted as prescribed, to a purchaser in good faith, is equivalent to a sale pursuant to judgment in an action to foreclose the mortgage, so far only as to be an entire bar of all claim or equity of redemption, upon, or with respect to, the property sold, of each of the following persons: 1st. The mortgagor, his heir, devisee, executor, or administrator. 2d. Each person, claiming under any of them by virtue of a title, or of a lien by judgment or decree subsequent to the mortgage, upon whom the notice of sale was served as prescribed in this title.[1] 3d. Each person so claiming, whose assignment, mortgage, or other conveyance was not duly recorded in the proper book for recording the same in the county, or whose judgment or decree was not duly docketed in the county clerk's office at the time of the first publication of the notice of sale; and the executor, administrator, or assignee of such a person. 4th. Every other person claiming under a statutory lien or incumbrance, created subsequent to the mortgage attaching to the title or interest of any person designated in either of the foregoing subdivisions of this section. 5th. The wife or widow of the mortgagor, or of a subsequent grantee, upon whom notice of the sale was served as prescribed in this title, where the lien of the mortgage was superior to her contingent or vested right of dower or her estate in dower.

An affidavit of the sale, stating the time when, and the place where, the sale was made; the sum bid for each distinct parcel separately sold; and the name of the purchaser of each distinct parcel, may be made by the person who officiated as auctioneer upon the sale. An affidavit of the publication of the notice of sale, and of the notice or notices of postponement, if any, may be made by the publisher or printer of the newspaper in which they were published, or by his foreman or principal clerk. An affidavit of the affixing of a copy of the notice, at or near the entrance of the proper court-house, may be made by the person who so affixed it, or by any person who saw it so affixed, at least eighty-

[1] Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Mowry *v.* Sanborn, 62 Barb. 223; Klock *v.* Cronkhite, 1 Hill, 107. A mortgage for the purchase money not being subject to the dower right of the mortgor's wife, though not a party to it, a sale under the power is a bar to the right. It may be regarded as claiming under him. Brackett *v.* Baum, 50 N. Y. 8. Notice must be served upon her. Service upon her husband alone is not enough. Northrup *v.* Wheeler, 43 How. Pr. 122.

four days before the day of sale. An affidavit of the affixing of a copy of the notice in the book kept by the county clerk may be made by the county clerk, or by any person who saw it so affixed, at least eighty-four days before the day of sale.[1] An affidavit of the service of a copy of the notice upon the mortgagor, or upon any other person upon whom the notice must or may be served, may be made by the person who made the service.[2] Where two or more distinct parcels are sold to different purchasers, separate affidavits may be made with respect to each parcel, or one set of affidavits may be made for all the parcels.

The matters required to be contained in any or all of the affidavits specified in the last section may be contained in one affidavit, where the same person deposes with respect to them. A printed copy of the notice of sale must be annexed to each affidavit, and a printed copy of each notice of postponement must be annexed to the affidavit of publication and to the affidavit of sale.

The affidavits specified in the last two sections may be filed in the office for recording deeds and mortgages in the county where the sale took place. They must be recorded at length by the officer with whom they are filed, in the proper book for recording mortgages. The original affidavits, so filed, the record thereof, and a certified copy of the record, are presumptive evidence of the matters of fact therein stated, with respect to any property sold which is situated in that county.[3] Where the property sold is situated in two or more counties, a copy of the affidavits certified by the officer with whom the originals are filed may be filed

[1] A notice once affixed is presumed to remain, and the affidavit may be made by one who saw it posted twelve weeks prior to the sale. It is not necessary that he should have seen it each week. Hornby *v.* Cramer, 12 How. Pr. 490.

[2] An affidavit on information and belief, as to the place of residence of the mortgagors, to whom notice was mailed, is sufficient, in the absence of proof that they did not receive the notices, or that they resided elsewhere. Mowry *v.* Sanborn, 62 Barb. 223. The holder of the mortgage may give the notice, though he be the purchaser. Hubbell *v.* Sibley, 5 Lans. 51.

[3] The affidavits are not conclusive; they may be disproved. Bunce *v.* Reed, 16 Barb. 347; Sherman *v.* Willett, 42 N. Y. 146; Mowry *v.* Sanborn, 62 Barb. 223; *S. C.* 72 N. Y. 534.

For form of affidavits see 5 Wait's Prac. 258, 261. The recording of the affidavits is not essential to the passing of title. Howard *v.* Hatch, 29 Barb. 297; Frink *v.* Thompson, 4 Lans. 489, overruling the *dictum* in Cohoes Co. *v.* Goss, 13 Barb. 137; also *dictum* in Tuthill *v.* Tracy, 31 N. Y. 157. See, also, Bryan *v.* Butts, 27 Barb. 503. But the affidavits must show a full compliance with the statute; and the omission of a fact which the statute requires to be shown by affidavit cannot be supplied by amendment of it, though perhaps new affidavits might be filed. Dwight *v.* Phillips, 48 Barb. 116.

and recorded in each other county wherein any of the property is situated. Thereupon the copy and the record thereof have the like effect, with respect to the property in that county, as if the originals were duly filed and recorded therein.

A clerk or a register who records any affidavits or a certified copy thereof, filed with him, must make a note upon the margin of the record of the mortgage in his office, referring to the book and page, or the copy thereof, where the affidavits are recorded.

The purchaser of the mortgaged premises upon a sale conducted as prescribed in this title obtains title thereto against all persons bound by the sale, without the execution of a conveyance.[1] Except where he is the person authorized to execute the power of sale, such a purchaser also obtains title in like manner upon payment of the purchase money, and compliance with other terms of sale, if any, without the filing and recording of the affidavits prescribed. But he is not bound to pay the purchase money until the affidavits specified in that section, with respect to the property purchased by him, are filed, or delivered, or tendered to him for filing.

An attorney or other person, who receives any money arising upon a sale made as prescribed in this title, must, within ten days after he receives it, pay into the supreme court the surplus exceeding the sum due and to become due upon the mortgage, and the costs and expenses of the foreclosure, in like manner and with like effect as if the proceedings to foreclose the mortgage were taken in an action brought in the supreme court and triable in the county where the sale took place.[2]

[1] Jackson *v.* Colden, 4 Cow. 266; Slee *v.* Manhattan Co. 1 Paige, 48.

The affidavits in such case stand in place of a deed, and are conclusive as against the mortgagor and those claiming under him. Arnot *v.* McClure, 4 Denio, 41; Cohoes Co. *v.* Goss, 13 Barb. 137, 144; Layman *v.* Whiting, 20 Barb. 559; Mowry *v.* Sanborn, 68 N. Y. 153.

[2] The mortgagee himself is not responsible to subsequent lien creditors for a surplus left in the hands of a purchaser. Russell *v.* Duflon, 4 Lans. 399. For proceedings in relation to surplus, see 5 Wait's Prac. 264.

But if the mortgagee receive the surplus he is liable to subsequent lien-holders, though not for interest on it until demand. Russell *v.* Duflon, *supra;* Bevier *v.* Schoonmaker, 29 How. Pr. 411.

Code of Civil Procedure 1880, §§ 2401–2403; Laws N. Y. 1880, pp. 312, 313.

The following costs are allowed in proceedings taken as prescribed in the title: 1st. For drawing a notice of sale, a notice of the postponement of a sale, or an affidavit, made as prescribed in this title, for each folio, twenty-five cents; for making each necessary copy thereof, for each folio, thirteen cents. 2d. For serving each copy of the notice of sale, required or expressly permitted to be served by this title, and for affixing each copy thereof required to be affixed upon the court-house,

1752. **North Carolina.** — Power of sale mortgages "have long been in general use unquestioned."[1] Deeds of trust are also in use. It is provided that upon the death of the mortgagee all his rights, powers, and duties shall devolve upon his executor or administrator.[2]

1753. **Ohio.** — Power of sale mortgages and trust deeds are seldom used.

1754. **Oregon.** — Power of sale mortgages and trust deeds are seldom used.

1755. **Pennsylvania.** — Power of sale mortgages and trust deeds were seldom used until quite recently, but have now become a common mode of creating marketable securities on which to raise loans for corporations.[3]

1756. **Rhode Island.** — Mortgages generally contain a power of sale. Trust deeds being less effectual are not in common use as security for loans.

At any sale by public auction made according to the provisions of any mortgage, or other conveyance by way of mortgage, or of any power of sale contained in it or annexed to it, the mortgagee, his heirs or assigns, or any person for him, may fairly and in good faith bid for and purchase the property or any part of it, in the same manner as other persons may bid for and purchase it; provided, that notice in writing of his intention to bid shall be

as prescribed in this title, one dollar. 3d. For superintending the sale and attending to the execution of the necessary papers, ten dollars.

The sums actually paid for the following services, not exceeding the fees allowed by law for those services, are allowed in proceedings taken as prescribed in this title: 1st. For publishing the notice of sale, and the notice or notices of postponement if any, for a period not exceeding twenty-four weeks. 2d. For the services specified in section 2390 of this act. 3d. For recording the affidavits, and also where the property sold is situated in two or more counties, for making and recording the necessary certified copies thereof. 4th. For necessary postage and searches.

The costs and expenses must be taxed, upon notice, by the clerk of the county where the sale took place, upon the request and at the expense of any person interested in the payment thereof. Each provision of this act relating to the taxation of costs in the supreme court and the review thereof applies to such a taxation.

[1] Hyman *v.* Devereux, 63 N. C. 624, 628; Blount *v.* Carroway, 67 N. C. 396; Paschal *v.* Harris, 74 N. C. 335; Olcott *v.* Bynum, 17 Wall. 44. A "stay law," providing that no property should be sold under a deed of trust or mortgage until the debts secured in the deed are reduced to judgments, was held unconstitutional, as not only impairing the obligation of a contract, but altering it by adding a condition. Latham *v.* Whitehurst, 69 N. C. 33.

[2] Laws 1887, ch. 147.

[3] Bradley *v.* Chester Valley R. R. Co. 36 Pa. St. 141, 151; Corpman *v.* Baccastow, 84 Pa. St. 363; *S. C.* 5 N. Y. W. R. 204.

given to the mortgagor, or left at his last and usual place of abode, twenty days prior to the time of sale at which he proposes to bid as mortgagee, and that the proper evidence that such notice has been given shall be in the possession of the auctioneer at the time the sale takes place; or that such mortgagee shall, in his public advertisement of sale, give notice that it is his intention to bid upon such property so advertised for sale.[1]

Whenever any mortgagee, or any person acting under a power of sale, shall sell any real estate the title to which will in any manner depend upon notice of sale to be published in any newspaper, the person causing such sale to be made shall cause a copy of the advertisement, in pursuance of which such sale is made, to be attached to the deed given thereunder, together with his, her, or their affidavit, stating when, how many times, and in what newspaper or newspapers, such advertisement was published, and the manner, time, and place of making such sale. Such copy and affidavit shall be recorded with the deed to which they are attached, and the record thereof shall be *primâ facie* evidence of the truth of the matters and things therein stated.[2]

1757. South Carolina. — Trust deeds seem to be in use. Power of sale mortgages, though not in very common use,[3] are valid, and the equity of redemption may be barred by a sale in compliance with the terms of the power.[4]

1758. Tennessee. — Power of sale mortgages and trust deeds are in use. Real estate sold under them by virtue of the power is subject to redemption at any time within two years, in the same manner as when sales are made under judicial decree,[5] unless the right of redemption is expressly waived or surrendered in the deed or mortgage.[6] But if the mortgagee does not exercise a power of sale free from the equity of redemption contained in

[1] G. S. ch. 166, § 15; Amended Acts 1878, ch. 719; P. S. 1882, ch. 176, § 15.

If the mortgagor has conveyed the equity of redemption the notice prescribed must be given to the purchaser. McLaughlin *v.* Hanley, 12 R. I. 61.

[2] P. S. 1882, ch. 173, § 11.

[3] Mitchell *v.* Bogan, 11 Rich. 686, per Withers, J.: "Not familiar in our observation."

[4] Robinson *v.* Amateur Asso. 14 S. C. 148.

[5] See § 1358.

[6] Code 1858, §§ 2124, 2125.

Where the grantor in a trust deed stipulated that "in the event a sale is made, I hereby waive the right of redemption given me by law; and in the event a sale is made the said grantee agrees, in consideration of the waiving of the right of redemption, to make the land bring as much as $4,000," it was held that the grantee was not bound to make the property bring that price unless he made the sale free from the equity of redemption. Ordway *v.* White, 3 Lea (Tenn.), 537.

a mortgage, and the sale be not made under a decree of court, the right of redemption will still exist. The statute cutting off the equity of redemption must be strictly pursued.[1]

1759. **Texas.** — Trust deeds are in common use, and power of sale mortgages are also sometimes used.[2]

1760. **Vermont.** — A power of sale in a mortgage is unusual if not unknown, and there is no statute regulating its exercise.[3] Neither are trust deeds in use as a mode of securing debts.

1761. **Virginia.** — Trust deeds are used to the exclusion, almost, of all other forms of security upon real estate. It is provided that the trustee in such deed,[4] except so far as may be therein otherwise provided, shall, whenever required by any creditor secured or any surety indemnified by the deed, or the personal representative of any such creditor or surety, after the debt due to such creditor, or for which such surety may be liable, shall have become payable, and default shall have been made in the payment thereof, or any part thereof, by the grantor, sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction, for cash, having first given reasonable notice of the time and place of sale, and shall apply the proceeds of sale, first to the payment of expenses attending the execution of the trust, including a commission to the trustee of five per cent. on the first three hundred dollars, and two per cent. on the residue of the proceeds, and then *pro rata* (or in the order of priority, if any, prescribed by the deed) to the payment of the debts secured and the indemnity of the sureties indemnified by the deed, and shall pay the surplus, if any, to the grantor, his heirs, personal representatives, or assigns.[5]

1762. **West Virginia.** — The form of trust deed is the same as that prescribed by the Code of Virginia. The trustee in any such deed shall, whenever required by any creditor secured or any

[1] Frierson *v.* Blanton, 57 Tenn. 272.

[2] Robertson *v.* Paul, 16 Tex. 472; Morrison *v.* Bean, 15 Tex. 267; Buchanan *v.* Monroe, 22 Tex. 537; McLane *v.* Paschal, 47 Tex. 365. See § 1792.

[3] Wing *v.* Cooper, 37 Vt. 169.

[4] "A deed of trust to secure debts or indemnify sureties may be in the following form, or to the same effect: —

"'This deed, made the day of , in the year , between (the grantor) of the one part, and (the trustee) of the other part, witnesseth: that the said (the grantor) doth (or do) grant unto the said (the trustee) the following property (here describe it). In trust to secure (here describe the debts to be secured or the sureties to be indemnified, and insert covenants or other provisions the parties may agree upon). Witness the following signatures and seals (or signature and seal).'" Code 1887, § 2441.

[5] Code 1887, § 2442.

surety indemnified by the deed, or the personal representative of any such creditor or surety, after the debt due to such creditor, or for which such surety may be liable, shall have become payable and default shall have been made in the payment thereof, or any part thereof, by the grantor, sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction, upon such terms as are mentioned in said deed; and if no terms are therein mentioned, then upon the following terms, to wit: If the property to be sold be real estate, one third of the purchase money cash in hand, one third thereof with interest in one year, and the residue thereof with interest in two years, from the day of sale, taking from the purchaser his notes, with good security, for the deferred payments, and retaining the legal title as further security; and if the property to be sold be personal estate, then for cash, having first given notice of such sale as hereinafter prescribed; and shall apply the proceeds of sale, first to the payment of expenses attending the execution of the trust, including a commission to the trustee of five per centum on the first three hundred dollars, and two per centum on the residue of the proceeds, then *pro rata* (or in the order of priority, if any, prescribed by the deed) to the payment of the debts secured and the indemnity of the sureties indemnified by the deed; and shall pay the surplus, if any, to the grantor, his heirs, personal representatives, or assigns.[1] Every such notice of sale shall show the following particulars: 1. The time and place of sale; 2. The names of the parties to the deed under which it will be made; 3. The date of the deed; 4. The office and book in which it is recorded; 5. The quantity and description of the land or other property, or both, conveyed thereby; 6. The terms of the sale.[2]

When any property is about to be sold under a deed of trust, the trustee shall, unless it be otherwise provided in the deed of trust, or in the opinion of the trustee the property to be sold be of less value than three hundred dollars, publish a notice of such sale in some newspaper published in the county, if there be one which will publish the notice at the rates prescribed by law. Such notice shall be published at least once a week for four successive weeks preceding the day of sale, and a copy of such notice shall be posted at the front door of the court-house for a like pe

[1] The trustee must give a bond before selling.

[2] Where the debtor conveys all his property to a trustee for the benefit of his creditors, the trustee must settle his account before a commissioner.

riod; but if there be no newspaper published in the county, or if there be none that will publish such notice at the rates prescribed by law, or if, in the opinion of the trustee, the property be of less value than three hundred dollars, such a notice of sale shall be posted at least thirty days prior thereto on the front door of the court-house of the county in which the property to be sold is, and at three other public places at least in the county, one of which shall be as near the premises to be sold (in case the sale be of real estate) as practicable; and in all cases, whether the notice be published or not, a copy of such notice shall be served on the grantor in the deed, or his agent or personal representative, if he or they be within the county, at least twenty days prior to the sale.[1]

1763. Wisconsin.[2] — A mortgage containing a power of sale may upon default be foreclosed by advertisement; provided no action has been instituted at law to recover the debt, or if instituted that it has been discontinued, or that an execution upon the judgment has been returned unsatisfied in whole or in part; and provided the mortgage containing such power has been duly recorded, and that all assignments of it have been recorded.[3] If the mortgage be payable by instalments, each instalment after the first is deemed a separate mortgage; and may be foreclosed for each instalment as if a separate mortgage were given for each.

Notice is given by publishing the same for six successive weeks, at least once a week, in a newspaper printed in the county where the premises or some part of them are situated, if there be one; otherwise in a newspaper published in an adjoining county, if there be one; but if not, then in a paper published at the seat of government. The notice must specify the names of the mortgagor and of the mortgagee, and of the assignee if any; the date of the mortgage and when recorded; the amount claimed to be due at the date of the notice; a description of the premises substantially as in the mortgage; and the time and place of sale.

The sale must be at public auction, between the hour of nine o'clock in the forenoon and the setting of the sun, in the county in which the premises or some part of them are situated, and must be made by the person appointed for that purpose in the mort-

[1] Code 1887, ch. 72, §§ 6, 7.

[2] R. S. 1878, ch. 152, §§ 3523–3543. This statute does not prevent a foreclosure by bill. Byron *v.* May, 2 Pin. 443.

[3] This provision does not apply to an executor or administrator. Hayes *v.* Frey, 54 Wis. 503.

gage, or by the sheriff or his deputy, to the highest bidder. The sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication to the time of sale. If the premises consist of distinct farms or lots, they must be sold separately; and no more shall be sold than may be necessary to satisfy the amount due, with interest and costs.

The mortgagee, his assigns, or his or their representatives, may fairly, and in good faith, purchase the premises, or any part thereof, at the sale.

The officer or other person making the sale gives the purchaser a certificate in writing under seal, setting forth a description of each tract sold, the sum paid therefor, and the time when the purchaser will be entitled to a deed, unless redeemed;[1] and within ten days files in the office where the deed is recorded a duplicate of such certificate. The premises may be redeemed within one year after such sale, on payment of the sum bid, with interest at the rate of ten per centum per annum from the time of sale; but the mortgagor may retain full possession until the title vests absolutely in the purchaser. If not redeemed, the officer, or some person appointed by the court for the purpose, executes a deed of the premises to the purchaser, or to the assignee of the certificate.[2]

Any surplus remaining after satisfying the mortgage is paid to the mortgagor or his assigns.

The evidence of sale may be perpetuated by an affidavit of the publication of the notice to be made by the printer, or by some person in his employ knowing the facts, and an affidavit of the fact of the sale to be made by the auctioneer, stating the time and place of sale, the sum bid, and the name of the purchaser; and such affidavits, when recorded, are presumptive evidence of the facts.[3] The record of the affidavits, and of the deeds executed, pass the title, and the conveyance is a bar of all equity of redemption; but no title accruing prior to the execution of the mortgage is affected.

A subsequent mortgagee is entitled to the same privilege of re-

[1] The deed may be executed by the officer who made the sale, though his term of office has expired, or by his successor in office. Hayes *v.* Frey, 54 Wis. 503.

[2] Failure to attach a seal to the certificate is not a fatal defect. Hawes *v.* Frey, *supra.*

[3] Bon *v.* Carroll (Wis.), 37 N. W. Rep. 91.

demption that the mortgagor might have had, or may satisfy the prior mortgage, and thereby acquire all the rights of the prior mortgagee.

When the premises, or any part of them, are purchased by the mortgagee, his representatives, or his or their assigns, the affidavits of publication, and of the circumstances of sale, are evidence of the sale, and of the foreclosure of the equity of redemption, without any conveyance being executed, in the same manner, and with like effect, as a conveyance executed by a mortgagee upon a sale to a third person.

When notice of the sale is published in other than the county in which the premises are situated, a copy of such notice must be served at least four weeks before the time of sale on the person in possession of the premises, in all cases where the same are occupied; and where they are not occupied, then upon the mortgagor, his heirs, or personal representatives, if he or they reside in the county where such premises lie. Proof of the service of such notice may be made, certified, and recorded in the same manner, and with the like effect, as proof of the publication of a notice of sale under a mortgage.

CHAPTER XL.

POWER OF SALE MORTGAGES AND TRUST DEEDS.

I. The nature and use of powers of sale, 1764–1772.
II. The power of sale is a cumulative remedy, 1773–1776.
III. Construction of power, 1777–1791.
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I. *The Nature and Use of Powers of Sale.*

1764. In general. — The delay and expense incident to a foreclosure and sale in equity have brought power of sale mortgages and trust deeds into general favor both in England and America; and although their general use is now confined to a part only of our States, the same influences which have already led to their partial adoption and use are likely to lead to their general use everywhere at an early day. It is true that recent codes and statutes have done something to simplify the remedy by bill in equity; but at best the process of foreclosure by suit is cumbersome and expensive as compared with the remedy afforded by a power of sale. Preliminary to a bill in equity, or to a petition or suit authorized by codes which adopt a bill in equity as the basis of the proceeding, is an investigation to ascertain who have become interested in the property since the taking of the mortgage. All such parties, sometimes quite numerous, must be made parties to the suit and must be served with process, else the foreclosure will not be complete. The decree of sale may be rendered only after a long delay. The sale is made through a sheriff or officer of the court, who must report his proceedings to the court. Orders must be obtained for the confirmation of the sale, and perhaps for

the distribution of the proceeds of it. There may also be attendant references to ascertain the amount of the mortgage debt, or to determine whether the whole property shall be sold together or in separate parcels; or to determine in what order different parcels shall be sold in consequence of the equities of subsequent purchasers; or, after the sale is made, to determine whether the title is such that the sale can be enforced against the purchaser. It is true that all these proceedings are designed for the protection of the mortgagor and others who may be interested in the property; but while such protection is occasionally not without its use, in almost all cases the parties interested in the property are equally well protected by the remedy out of court afforded by a power of sale, and, as will be presently noticed, when protection is needed in exceptional cases the courts can be effectually appealed to.

A power of sale, whether vested in the creditor himself or in a trustee, affords a prompt and effectual security. Although it may press harder upon the debtor in point of time, it is not without its advantages to him. The delay and expense incident to a foreclosure suit he is obliged to pay for in some way; and it is generally in the way of paying a higher rate of interest for the loan.[1] It is probably safe to say that in its practical operation the power of sale is not used to oppress or injure the debtor more frequently than is the process of foreclosure by suit. There is undoubtedly some prejudice against this form of security still remaining. This is more especially the case where it is little used, and in those parts of the country where capital is scarce and the difficulty of obtaining large sums of money without delay is a serious one. But both the fancied and real objections to powers of sale in mortgages and trust deeds are likely soon to give way under the real advantages they afford to both the debtor and creditor; and their general adoption, to the exclusion of other forms of security upon real property, may be looked for at an early day.

1765. In some of the early cases both in England and America, the validity of powers of sale in mortgages was much questioned. The case of *Croft* v. *Powell*[2] was for a considerable time considered as an authority against mortgages of this description, although their validity was not involved in the decision. This was a mortgage made by a deed and separate defeasance, which provided that if the loan was not paid within the time

[1] First Nat. Bank *v.* Bell S. & C. Min. Co. (Mont.) 19 Pac. Rep. 403, quoting text.

[2] 2 Comyn, 603 (1738).

agreed, then the mortgagee should mortgage or absolutely sell the same lands free from redemption, and out of the money raised by such mortgage or sale pay the loan and interest, and be accountable for the overplus to the mortgagor or his heirs. The money not being paid at the time, the mortgagee agreed to convey the estate to a third person, and in the agreement and conveyance an exception was made, and the defeasance was mentioned. For this reason it was considered that it was not the intention of the mortgagee to give the purchaser an absolute and indefeasible estate, for it was not conveyed to him absolutely and free from the equity of redemption, but subject to the defeasance.

When Mr. Powell wrote his Treatise on Mortgages[1] he considered the validity of powers of sale "of too doubtful a complexion to be relied upon as the source of an irredeemable title." Even so late as 1825, although such powers had been sustained in the few cases in which they had been the subject of adjudications during the early part of the present century, Lord Eldon, then Chancellor of England, while not denying the validity of a mortgage in this form, strongly objected to it, saying: "Here the mortgagee is himself made the trustee. It would have been more prudent for him not to have taken upon himself that character. But it is too much to say that if the one party has so much confidence in the other as to accede to such an arrangement, this court is for that reason to impeach the transaction. It is next provided that if the mortgagor shall make default in paying the sum stated at the appointed time, the mortgagee may make sale and absolutely dispose of the premises conveyed to him. This is an extremely strong clause; but perhaps it may be one of the many new improvements in conveyancing which make conveyancing so different from what it was when I was in practice in that

[1] Powell on Mortg. 19.

"Their validity," says Mr. Coventry, "was at first much questioned, and when the doubts surrounding their introduction were removed, they were for a considerable time, and are even now, in some degree, viewed as a harsh measure, and only to be used where the money lent approaches very nearly the value of the estate mortgaged, or where the interest is likely to run in arrear. A mortgage of this description is certainly a prompt, powerful security compared with the common mode of mortgaging. . . . The evil of the former mode of mortgaging is, that the mortgagee, in proceeding for the recovery of his money, is liable to be delayed for an indefinite time in chancery. The new mode is framed with a view to a settlement out of court, so that a large portion of chancery practice will be abstracted from court if this mode of mortgaging becomes, as it bids fair to do, the only acknowledged mode of mortgaging in general use." Mortg. Prac. p. 150.

part of law." Here he inquired of Mr. Sugden how the practice was in that respect. Mr. Sugden admitted that the clause was usually inserted in deeds like the present. Lord Eldon: "How can it be right that such a clause should be introduced into a deed under which the party is a trustee for himself? Then there is a clause that it shall not be necessary for the purchaser to inquire whether a sale was proper, etc. Here, too, it must be recollected that this is a clause to be acted upon, not by a middle person, who is to do his duty between the *cestuis que trust*, but the mortgagee is himself made trustee to do all these acts. Upon the whole, I must say that this deed seems to me of a very extraordinary kind, and that there are clauses in it upon which it would be difficult to induce a court of equity to act."[1] It seems, however, that his observations were made without deliberation, and were not called for in the case before him. By general accord, power of sale mortgages were about this time adopted into general use in England, and they have always been fully sustained and approved. At the present time every mortgage has a power of sale; for when not inserted in the deed, as is usually the case, a power of sale is supplied by statute.[2]

1766. The powers generally inserted in mortgages used in England are much more complete, and give a more speedy remedy after a default than the statute power, so that it is now the general understanding that there must be a power of sale, else the money is hardly obtainable upon the mortgage. For these reasons it is now held, contrary to the opinion formerly entertained,[3] that trustees, under a direction in a will to raise money by mortgage, are authorized to give the mortgagee a power of sale in case of default in repayment of the money or the interest of it. In a recent case,[4] Sir R. Malins, V. C., said: "I am of opinion that a

[1] Roberts *v.* Bozon, Chan. (Feb. 1825) MS. cited in Coventry's Prac. Mort. p. 150; 1 Powell's Mortg. (Am. ed.) 9 *a*, note.

[2] See § 1722.

[3] In Sanders *v.* Richards, 2 Coll. 568, it was held that an executor had no right to give a mortgage with a power of sale. This is overruled in the cases cited in the following note. In Clarke *v.* The Royal Panopticon, 4 Drew. 26, Vice-Chancellor Kindersley remarked: "It is said, that the practice of conveyancers is to treat a power of sale as a *necessary incident* to a mortgage; to introduce it universally. . . . I admit that it is much more frequent than it used to be thirty or forty years ago. But it is by no means an *universal* practice; and many mortgages may be seen at this day in which no power of sale is introduced." But waiving this, he held that a special power to a trustee to mortgage does not give him authority to sell, and *à fortiori* does not give him a right to give another person power to sell.

[4] *In re* Chawner's Will, L. R. 8 Eq.

power of sale is a necessary incident to a mortgage, and that when a testator says that a sum of money is to be raised by mortgage, he means it to be raised in the way in which money is ordinarily raised by mortgage, and, therefore, that the mortgage may contain what mortgages in general do contain, namely, a power of sale." This is further illustrated by another case where a mortgage was made by a deposit of title deeds, with a written agreement by the mortgagor "to execute a mortgage" when called upon to do so.[1] He then sold and conveyed the estate subject to the mortgage; and afterwards executed a power of sale mortgage to his mortgagee, who subsequently sold the estate under the power. It was held that the purchaser was bound by the power of sale; the Master of the Rolls saying the "mortgage very properly contains a power of sale."

1767. It is not possible to say when powers of sale in mortgages were first used in this country; but it appears from a statute enacted in New York in the year 1774[2] that they were already in use at that time. The provisions of that statute were reënacted in the first revision of the statutes of that state, and under various modifications they have been continued to the present day. In Massachusetts, in 1826, Chief Justice Parker[3] said that a power to sell executed to one who relies upon such power, and expects and intends to purchase an absolute estate, would without doubt pass an unconditional estate to the purchaser; yet he says "this form of conveyance is rare in this country;" and he cites the case of *Croft* v. *Powell*, decided almost a hundred years before, to the effect that if the purchaser knows the original nature of the transaction, and appears not to have purchased wholly without reference to the conditional character of the title,

569 (1869). In Bridges *v.* Longman, 24 Beav. 27, the Master of the Rolls held that a power of sale is incident to a power to raise money by mortgage. See, also, to same effect, Selby *v.* Cooling, 23 Beav. 418; Russell *v.* Plaice, 18 Beav. 21; Cook *v.* Dawson, 29 Beav. 123, 128; Vane *v.* Rigden, L. R. 5 Ch. 663; Cruikshank *v.* Duffin, L. R. 13 Eq. 555, 560.

[1] Leigh *v.* Lloyd, 35 Beav. 455.

[2] Act of 19 March, 1774. From this statute it appears that doubts were then entertained whether sales under powers, by the mere act of the person to whom the power was granted, would extinguish the equity of redemption. After reciting the inconvenience of allowing them to be impaired, it declares that the rights of *bonâ fide* purchasers shall not be debated. See, also, as to the early use of powers of sale in New York, Bergen *v.* Bennett, 1 Caines Cas. 1, 3; Doolittle *v.* Lewis, 7 Johns. (N. Y.) Ch. 45; Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48, 69; Lawrence *v.* Farmers' Loan & Trust Co. 13 N. Y. 200.

[3] In Eaton *v.* Whiting, 3 Pick. (Mass.) 484.

he will be compelled in equity to surrender it on receiving the money he has advanced.

In some early cases it had been contended that the power of sale so altered the character of the conveyance as to deprive it of the qualities of a mortgage; but in *Eaton* v. *Whiting* it was said that without doubt the power while unexecuted left the estate as it would have been if no power had been given.[1]

Fifty years ago power of sale mortgages were not in general use anywhere in this country; and although considerable use was made of them at an earlier time than any corresponding use was made of them in England,[2] they have been adopted in the latter country, to the exclusion of other forms of security, while they have not been so adopted here. Within the past half century, however, the use of them has rapidly extended, so that in several states any other form of mortgage is exceptional. The validity of these powers of sale is everywhere recognized, and the use of them, either in mortgages or in trust deeds, is becoming general.[3]

1768. The use of power of sale mortgages, however, has not yet become so universal here as to lead to their being regarded generally as a necessary incident of a mortgage. In New York it is true that as early as 1823 Chancellor Kent decided that a power of attorney to execute a mortgage authorized the making of it with a power of sale, because such a power was then one of the customary and lawful remedies given to a mortgagee; that it had become an incident to the power to mortgage, and was of course included under the authority to mortgage, unless specially excluded.[4] But if elsewhere the usage has become so established as to warrant a similar declaration, the question has not since been presented to the courts for judicial determination. In Massachusetts, where the use of this form is now more nearly universal, probably, than in any other part of the country, it was held, in 1858, that a stipulation "to give a mortgage" was com-

[1] Taylor *v.* Chowning, 3 Leigh (Va.), 654; Turner *v.* Bouchell, 3 Har. & J. (Md.) 99.

[2] In Jackson *v.* Henry, 10 Johns. (N. Y.) 185, 196 (1813), a case upon a power of sale mortgage, Chief Justice Kent remarked: "There is no case precisely like this in the English books, because these powers are not in use in Great Britain."

[3] Turner *v.* Johnson, 10 Ohio, 204; Brisbane *v.* Stoughton, 17 Ohio, 482; Hyman *v.* Devereux, 63 N. C. 624, 628; Mitchell *v.* Bogan, 11 Rich. (S. C.) 686; Longwith *v.* Butler, 8 Ill. 32; Kinsley *v.* Ames, 2 Met. (Mass.) 29; Lydston *v.* Powell, 101 Mass. 77.

[4] Wilson *v.* Troup, 7 Johns. (N. Ch. 25.

plied with by giving one without a power of sale; and that a power of sale was not then a usual accompaniment of a mortgage.[1] Since that time, however, there can be no doubt that a power of sale has become, not merely a usual accompaniment of a mortgage, but almost an invariable one; and it may be anticipated that, when the occasion arises, the courts will hold, as have the courts in England, that a power of sale is a necessary incident to a mortgage.

Although in several states a mortgage is by statute or judicial interpretation declared to be a mere security for the payment of a debt, and not a conveyance of the legal title, yet this view of the nature of the security does not in any way interfere with or impair the doctrine of powers to sell.[2]

1769. Deeds of trust, as has already been noticed, are in legal effect mortgages.[3] Where a mortgage is regarded, in accordance with the common law doctrine, as a conveyance of the legal estate, a deed of trust is of course none the less a conveyance of the legal estate;[4] the only difference of opinion on this point is, whether in those states in which a mortgage is regarded as a mere lien, and not a conveyance of the legal estate, a deed of trust shall be held to vest the legal estate in the trustees. Generally a deed of trust is in this respect held to have only the same effect as a mortgage; such being the decision in Iowa,[5] Nebraska,[6] Kansas,[7] and Texas.[8] But, on the other hand, in Florida and California it is held that although a mortgage does

[1] Capron *v.* Attleborough Bank, 11 Gray (Mass.), 492; Platt *v.* McClure, 3 Woodb. & M. 151.

[2] Calloway *v.* People's Bank of Bellefontaine, 54 Ga. 441, 449.

[3] § 62; Shillaber *v.* Robinson, 97 U. S. 68; Southern Pac. Ry. Co. *v.* Doyle, 11 Fed. Rep. 253; Bartlett *v.* Teah, 1 McCrary, 176; 1 Fed. Rep. 768; McLane *v.* Paschal, 47 Tex. 365, 369; Blackwell *v.* Barnett, 52 Tex. 326; De Wolf *v.* Sprague Manuf. Co. 49 Conn. 282.

[4] Newman *v.* Jackson, 12 Wheat. 570.

In Ohio, under a deed of trust as collateral security or in the nature of a mortgage, the grantor in possession retains the legal estate, and a subsequent judgment against him becomes a lien upon the property subject to the mortgage. Martin *v.* Allis, 42 Ohio St. 94.

In Louisiana, a deed of trust will not be given the effect of an act of mortgage binding on third persons, although properly recorded, and although it might be considered between the parties as intended by them to secure the payment of a debt as therein mentioned. A mortgage in this state must conform with the forms prescribed by the local law and customs, and must announce clearly the purpose of the act. Thibodaux *v.* Anderson, 34 La. Ann. 797.

[5] Newman *v.* Samuels, 17 Iowa, 528, 535.

[6] Webb *v.* Hoselton, 4 Neb. 308; Kyger *v.* Ryley, 2 Ib. 20, 28.

[7] Lenox *v.* Reed, 12 Kans. 223.

[8] McLane *v* Paschal, *supra*.

not vest the legal estate in the mortgagee, a deed of trust is a conveyance which does vest the legal title in the trustee.[1] And in the latter state such a deed is not a mortgage requiring judicial foreclosure.[2]

As a general rule, upon the payment of a deed of trust satisfaction is entered on the margin in the same way that it is in the case of a mortgage, and a reconveyance is not necessary. The statutes upon this subject, although relating in terms to mortgages, embrace deeds of trust.[3] In like manner statutes relating to the recording of mortgages embrace deeds of trust without special mention of them.[4]

So substantially alike are a mortgage and a deed of trust given as security, that a railroad authorized to mortgage its property may do this by means of a deed of trust;[5] and a bank authorized to take a mortgage of lands may take a deed of trust for its use to trustees.[6] "The attributes of a deed of trust for such purposes," says Mr. Justice Walker, of Arkansas, in a recent case,[7] "and a mortgage with power of sale, are the same; both are intended as securities, and in a legal sense are mortgages; in both, the legal title passes from the grantor; but in equity he is, before foreclosure, considered the actual owner in both, and as broadly in one as the other; the grantor has the right to redeem, in other words the equity of redemption, which can only be barred by a valid execution of the power."

1770. A deed of trust is often preferred to a mortgage on account of the intervention of a disinterested person as trustee. It has already been noticed that Lord Eldon thought it quite objectionable that a mortgagee should himself be made the trustee to sell under the power. But Mr. Coventry, after quoting his remarks, expressed his own preference for a mortgage with a power of sale in the mortgagee. He thought the intervention of a trustee is in all cases a serious inconvenience; and that, even if

[1] Soutter *v.* Miller, 15 Fla. 625; and see authorities cited by Judge Dillon, in Am. L. Reg. (N. S.) 655; Bateman *v.* Burr, 57 Cal. 480.

[2] Grant *v.* Burr, 54 Cal. 298; Koch *v.* Briggs, 14 Cal. 256.

[3] Ingle *v.* Culbertson, 43 Iowa, 265; Woodruff *v.* Robb, 19 Ohio, 212; Smith *v.* Doe, 26 Miss. 291; Crosby *v.* Huston, 1 Tex. 239; M'Gregor *v.* Hall, 3 St. & P. (Ala.) 397. *Contra,* Wilkins *v.* Wright, 6 McLean, 340.

[4] Fogarty *v.* Sawyer, 23 Cal. 570; Magee *v.* Carpenter, 4 Ala. 469. See further on this subject an article by Judge Dillon, 2 Am. L. R. (N. S.) 641; Wilkins *v.* Wright, *supra;* Bank of Commerce *v.* Lanahan, 45 Md. 396; Woodruff *v.* Robb, *supra.*

[5] Wright *v.* Bundy, 11 Ind. 398, 404.

[6] Bennett *v.* Union Bank, 5 Humph. (Tenn) 612.

[7] Turner *v.* Watkins, 31 Ark. 429, 437.

he does not become hostile to the creditor, he may, by his inexperience or squeamishness, subject him to much trouble; and he recommended that the mortgagee retain in his own hands absolute power over his own property. The objections to the intervention of a trustee are apt to come from the mortgagee, and he is generally in position to have his own choice in the matter. The mortgagor is apt to suppose that, in placing the exercise of the power in the hands of a disinterested third party, whose position in relation to it is merely that of a trustee, he secures for himself the protection of fair dealing. It generally happens, however, that the debtor has to pay for the services of a trustee, whose disinterestedness is no more than that of the creditor himself. The trustee is obliged to act, when the creditor secured by the deed has a legal right to call for the exercise of the power, and if he neglects or refuses to act, he may be compelled to do so or to give up the trust. The trustee may, when in doubt about his duty, apply to the court in equity to direct him.

This form of security has come into very general use in several states, and in Virginia and West Virginia, in particular, has come into universal use in securing debts upon real estate.[1]

1771. The trustee in a deed of trust is the agent of both parties, and he should perform his duties with the strictest impartiality.[2] Inasmuch as the trustee acts for both parties, and the law requires of him the utmost good faith and the strictest impartiality, he should have no personal interest to subserve, and the beneficiaries should not be relatives or friends whom he might feel called upon to accommodate. Certainly no one interested in

[1] Taylor *v.* Stearns, 18 Gratt. 244, 278 (1868).

Mr. Justice Rives, in the course of an able opinion holding unconstitutional, as applied to trust deeds, a law staying the collection of debts for a limited period, spoke of the nature and use of this security. "What is a deed of trust? It is a form of security which has, in our practice, superseded the mortgage, and doubtless for the very reason that it does not require the intervention of the courts. The introduction of trustees, as impartial agents of the creditor and debtor, admits of a convenient, cheap, and speedy execution of the trust, and involves none of the expenses and delays attendant upon mortgages.

"At an early period it met with some resistance from the court and the bar, though feeble and ineffectual. It was deprecated as an engine of oppression in the hands of the creditor. It was denounced as a pocket judgment. . . . It is now a favorite security for the payment of money, closely interwoven with the transactions of business, and firmly established by the practice of the country and the sanction of the courts. It has, doubtless, aided credit, facilitated the collection of debts, and saved to the debtor the costs of legal proceedings."

[2] Sherwood *v.* Saxton, 63 Mo. 78, and cases cited.

the debt secured, and no one who is a near relative of the beneficiary, should be a trustee.[1] A failure to use reasonable diligence, or an abuse of his discretionary powers, renders him personally liable to the party injured for the damage done.[2] Thus, if without authority he releases any part of the security, or after a sale of the property under the power improperly releases the purchaser from his bid, and subsequently sells for a less sum, he is liable to the beneficiary in an action at law for the damages sustained.[3] A sheriff or other officer acting in lieu of a trustee, under authority of a statute, acts in his official capacity, and for a breach of trust or failure of duty is liable upon his bond.[4]

The fact that the trustee named in a deed of trust has acted as the attorney in fact of the creditor in selling the property to the mortgagor does not disqualify him to act in the execution of the trust.[5] But a trustee may be removed by a court of equity on account of personal ill-will between him and the *cestui que trust.*[6]

1772. The debt secured by a deed of trust belongs *primâ facie* to the beneficiary named in the deed. When this is claimed by the trustee himself, the presumption against him derived from the deed must be overcome by the clearest proof; and the fact that the note and deed have been left in his possession is of little importance, especially when the beneficiary is a woman and a near relative.[7]

II. *The Power of Sale is a Cumulative Remedy.*

1773. Generally a power of sale does not affect the right to foreclose in equity, either by a strict foreclosure,[8] or by a judicial sale,[9] or to foreclosure in any way provided by statute for the

[1] Long *v.* Long, 79 Mo. 644.

[2] Murrell *v.* Scott, 51 Tex. 520.

[3] Sherwood *v.* Saxton, 63 Mo. 78.

[4] State *v.* Griffith, 63 Mo. 545; §§ 1745, 1785.

[5] Sternberg *v.* Valentine, 6 Mo. App. 176.

[6] McPherson *v.* Cox, 96 U. S. 404.

[7] Gimbel *v.* Pignero, 62 Mo. 240.

[8] Wayne *v.* Hanham, 9 Hare, 62; *S. C.* 20 L. J. 530; Slade *v.* Rigg, 3 Hare, 35; Cormerais *v.* Genella, 22 Cal. 116.

[9] Hutton *v.* Sealy, 4 Jur. N. S. 450; McGowan *v.* Branch Bank at Mobile, 7 Ala. 823; Marriott *v.* Givens, 8 Ala. 694; Vaughan *v.* Marable, 64 Ala. 60; Carradine *v.* O'Connor, 21 Ala. 573; Wofford *v.* Police Board, 44 Miss. 579; McAllister *v.* Plant, 54 Miss. 106; Fogarty *v.* Sawyer, 17 Cal. 589; Cormerais *v.* Genella, *supra;* Brickell *v.* Batchelder, 62 Cal. 623; Atwater *v.* Kinman, Harr. (Mich.) 243; Morrison *v.* Bean, 15 Tex. 267, 269; Blackwell *v.* Barnett, 52 Tex. 326; Frierson *v.* Blanton, 1 Bax. (Tenn.) 272; McDonald *v.* Vinson, 56 Miss. 497; Green *v.* Gaston, 56 Miss. 748; Charleston *v.* Caulfield, 19 S. C. 201; Denver B. & M. Co. *v.* McAllister, 6 Colo. 261, 266; Knox *v.* McCain, 13 Lea (Tenn.), 197; First Nat. Bank *v.* Bell S. & C. Min. Co. (Mont.) 19 Pac. Rep. 403, quoting text.

ordinary foreclosure of mortgages, as by entry and possession, or by suit at law. The power is merely a cumulative remedy. It is one species of foreclosure, but it does not exclude jurisdiction in equity. The option, however, to proceed in equity, lies wholly with the mortgagee. A resort to a court of equity is not necessary, except where made so by statute; it can be effectually exercised without the aid of the courts.[1] If the power proves to be defective, a resort to a suit in equity is rendered necessary.[2] Even after the filing of a bill in equity to foreclose such a mortgage, and while the bill is pending, a sale may be made under the power.[3]

A resort to proceedings in equity is more frequent under deeds of trust than with mortgages. The creditor may sometimes be compelled to do this in order to control the adverse action of the trustee; and a trustee may sometimes do so in order to obtain the direction of the court as to his duties. A trustee may resort to a bill in equity in order to prevent the bar of the statute of limitations which would occur before a sale could be advertised under the deed.[4] When a trustee under a trust deed enters into a collusive arrangement with the grantor in the deed and declines to execute the trust, and after instituting an action of ejectment to recover possession of the premises dismisses it against the wish of the beneficiary, a foreclosure may be had in chancery and a receiver may be appointed, upon showing the inadequacy of the security for the payment of the debt.[5] A court of equity, whenever a contingency arises which gives it jurisdiction and occasion to interfere, will, at the instance of a *cestui que trust*, control, restrain, and direct the exercise of the power.[6]

1774. The court will appoint a new trustee upon the death, inability, or declination of the trustee named in the deed of trust, upon the application of the persons interested in the execution of the trust, and of the author of the trust as well;[7] but they are all necessary parties to a bill to obtain such appointment. Although the person who made the trust deed has conveyed to another his interest in the premises, so long as he remains liable for the payment of the note secured by the deed, he is interested in the ap-

[1] Hyde *v.* Warren, 46 Miss. 13.

[2] Webb *v.* Haeffer, 53 Md. 187; State Bank of Bay City *v.* Chapelle, 40 Mich. 447.

[3] Brisbane *v.* Stoughton, 17 Ohio, 482.

[4] McDonald *v.* Vinson, 56 Miss. 497.

[5] Myers *v.* Estell, 48 Miss. 372.

[6] Youngman *v.* Elmira & Williamsport R. R. Co. 65 Pa. St. 278.

[7] Clark *v.* Wilson, 53 Miss. 119.

pointment of a proper person to sell the property in such manner as not unnecessarily to cause a deficiency. The purchaser from him is directly interested in the sale of the property, and is also a necessary party.[1]

So, also, when a trustee removes to a foreign country and there becomes a permanent resident, he incapacitates himself from discharging the duties of his trust and vacates his office. A new trustee may thereupon be appointed. Where a railroad mortgage provides that upon the death, removal, or incapacity of a trustee the majority of the bondholders may designate in writing a person to fill the vacancy, and the bondholders select a new trustee in place of one who has permanently removed from the state, the courts will recognize the new trustee, and restrain the other from acting.[2]

A trustee who has once accepted the trust is not allowed to lay it down without the assent of the beneficiary, or the decree of a court of equity;[3] but if within the jurisdiction of the court, may be compelled to discharge the trust.[4]

The trust deed often makes provision for the filling of any vacancy that may occur in the office of trustee; and if the person who is to execute the trust and the event upon which he may execute it are distinctly described, he may act, and his acts will be valid. But if a power to appoint a new trustee be conferred by the deed upon the *cestui que trust*, his assignee cannot make a valid appointment, for this power of appointment is personal or in gross; is a confidence reposed in him which he cannot delegate to another, unless expressly authorized by the donor.[5]

Where a deed of trust appoints the sheriff of the county or any other person to act in case of the death or absence of the trustee named in the deed, the holder of the obligation secured cannot, by an *ex parte* proceeding, have a third person appointed trustee.[6]

A deed of trust provided that in the event the trustee named should be unwilling or unable to act in carrying out the trust he

[1] Holden *v.* Stickney, 2 MacArthur (D. C.), 141.

[2] Farmers' Loan & Trust Co. *v.* Hughes, 11 Hun (N. Y.), 130.

[3] Drane *v.* Gunter, 19 Ala. 731.

[4] Sargent *v.* Howe, 21 Ill. 148.

[5] Clark *v.* Wilson, 53 Miss. 119; Equitable Trust Co. *v.* Fisher, 106 Ill. 189. If by the terms of a deed of trust the *cestui que trust* be authorized to appoint a substitute trustee in the event of the death, refusal, or failure of the original trustee to act, and the trustee decline to execute the trust unless, in addition to his commissions, he is paid for his services, such refusal constitutes such a failure as authorizes the appointment of a substitute. Klein *v.* Glass, 53 Tex. 37.

[6] Bacigalupo *v.* Lallement, 7 Mo. App. 595.

should appoint a substitute trustee; and in the event the trustee should refuse to appoint a substitute trustee, then it should be lawful for the holder of the note, due and unpaid, to appoint a substitute trustee under his hand and seal, and that his acts should be effectual and binding. Prior to any action being taken under the deed of trust, the original trustee died without appointing a substitute, and afterwards the holder of the note appointed, in writing not under seal, a substitute trustee, by whom the land, after default, was advertised, sold, and conveyed. In a controversy involving the validity of the sale, it was held that, the original trustee being rendered unable to act by death, though there was technically no refusal to appoint a substitute, there existed what was in effect equivalent to a refusal, and that, the execution of the power being in other respects valid, the omission of a seal in the appointment of the substitute trustee did not invalidate it.[1]

1775. The sale is by virtue of the power and not of the decree when the court enforces the power. Upon the death of the trustee named in a deed of trust, a court of equity has power to appoint a new trustee to execute the power of sale, and to determine the amount of the debt secured by the trust; but a sale by such trustee professedly by virtue of the trust deed, made in pursuance of such decree, is not a sale made under a decree of foreclosure, but one made by virtue of the power in the trust deed.[2] A sale made by decree of a court of equity varying substantially in its terms from the provisions of the power is a judicial sale and not a sale under the power.[3]

It has been held in Virginia that such trustee cannot sell until the amount of the debt secured is ascertained; and that either party in interest may resort to a court of equity for this purpose.[4] After ascertaining the amount the court may, in its discretion, dismiss the bill and leave the trustee to sell under the power, or may retain the case and have the trust executed under its own supervision. The court may also appoint a commissioner to make the sale instead of the trustee; but he must pursue the provisions

[1] Jacobs *v.* McClintock, 53 Tex. 72.

[2] Rice *v.* Brown, 77 Ill. 549; Holden *v.* Stickney, 2 McArthur (D. C.), 141; Staats *v.* Bigelow, Ib. 367; Doolittle *v.* Lewis, 7 Johns. (N. Y.) Ch. 45; Beatie *v.* Butler, 21 Mo. 313.

[3] Chew *v.* Hyman, 7 Fed. Rep. 7.

[4] Wilkins *v.* Gordon, 11 Leigh (Va.), 547.

of the deed as to the terms and mode of sale. The court cannot set aside the deed of trust in any respect.[1]

1776. When debt is unliquidated. — If the amount secured by the mortgage can be ascertained by calculation, there is no objection to a foreclosure under the power;[2] neither is there if it is conditioned for the delivery of certain specified articles, when a specified sum is authorized to be retained from the proceeds upon a breach of the condition.[3] It is then equivalent to a mortgage to secure the payment of a definite sum. But a mortgage given to secure and cover unliquidated damages cannot be foreclosed in this manner[4] until the amount due under the mortgage has been ascertained. It has been held also that under a deed of trust, if the amount of the debt secured be unliquidated and uncertain, a sale cannot be made under the power until the amount of the debt has first been determined in a court of equity.[5]

The objection that the sum secured is uncertain or unliquidated has particular force in those states in which there are statutory provisions that only so much of the estate as may be necessary to satisfy the mortgage debt shall be sold.

III. *Construction of Power.*

1777. The power to sell may not only be made by an instrument separate from the mortgage,[6] but it may be to a third person, instead of the mortgage creditor; for instance, it may be in the form of a power of attorney to a third person; and such power, when executed according to its terms, effectually cuts off the equity of redemption.[7] Moreover, a power in the mortgage or deed may be changed by a writing subsequently executed by the parties under seal.[8] A power of sale, though it should be expressly and fully conferred, may sometimes arise by necessary implication from the terms of the instrument.[9]

1777 *a*. A power of sale may in general be conferred by any owner of lands who has the legal capacity to convey them.

[1] Crenshaw *v.* Seigfried, 24 Gratt. (Va.) 272.

[2] Mowry *v.* Sanborn, 62 Barb. (N. Y.) 223; *S. C.* 68 N. Y. 153. See § 1812.

[3] Jackson *v.* Turner, 7 Wend. (N. Y.) 458.

[4] Ferguson *v.* Kimball, 3 Barb. (N. Y.) Ch. 616; Mowry *v.* Sanborn, *supra;* Mosby *v.* Hodge, 76 N. C. 387.

[5] Wilkins *v.* Gordon, 11 Leigh (Va.), 547. See Riggs *v.* Armstrong, 23 W. Va. 760.

[6] Alexander *v.* Caldwell, 61 Ala. 543.

[7] Brisbane *v.* Stoughton, 17 Ohio, 482.

[8] Baldridge *v.* Walton, 1 Mo. 520.

[9] Purdie *v.* Whitney, 20 Pick. (Mass.) 25; Mundy *v.* Vawter, 3 Gratt. (Va.) 518.

A statute which provides that any married woman above the age of eighteen years, joining with her husband, may make a valid mortgage or other conveyance of her real estate, or of any interest therein, authorizes such married woman executing a mortgage or deed of trust in the manner provided to confer a power of sale, the exercise of which will effectually bar her equity of redemption.[1] Such a power is an irrevocable authority to aid in the alienation of the estate, and bears no analogy to covenants declared by the common law to be inoperative in the deed of a married woman.[2]

1777 *b*. The mortgage generally provides upon what event the power may be exercised. In general it is provided that a sale under the power may be had upon any default in the conditions of the mortgage. A default in the payment of any instalment of the principal or of the interest of the mortgage debt is a default which authorizes the exercise of the power.[3]

Under a deed of trust securing several notes due at different times which authorizes the trustee to sell in case the debtor fails to pay "said notes on or before the maturity thereof," the trustee or the beneficiary has the right to enforce a sale of the land for the payment of one or more of the notes not paid at maturity, without waiting for the maturity of all the notes.[4] The same construction is given to a power to sell in the event that "the said notes should not be well and truly paid."[5] A sale made before the debt or any part of it is due is absolutely void and passes no title.[6]

1778. The parties may also make such provisions and regulations about the sale of the property under the trust as they may choose; and the sale must be in accordance with the provisions of the power given. No particular form of words is necessary to constitute the power. The essential provisions of it should be clearly and fully expressed, for the title of the purchaser under the power rests upon the authority there given.[7] When in a trust deed the powers of the trustee are not strictly

[1] Barnes *v.* Ehrman, 74 Ill. 402.

[2] Barnes *v.* Ehrman, *supra*, per Scott, J.

[3] §§ 1177, 1178; Hooper *v.* Stump (Arizona), 14 Pac. Rep. 799; Brickell *v.* Batchelder, 62 Cal. 623; Gustav. Adolph. Build. Asso. *v.* Kratz, 55 Md. 394; Potomac Manuf. Co. *v.* Evans (Va.). 6 S. E. Rep. 2. Cured by tender before sale. Phillips *v.* Bailey, 82 Mo. 639.

[4] Bridges *v.* Ballard, 62 Miss. 237.

[5] Reddick *v.* Gressman, 49 Mo. 389, Hunt *v.* Harding, 11 Ind. 245.

[6] Long *v.* Long, 79 Mo. 644; Eitelgeorge *v.* Mut. House Building Asso. 69 Mo. 55. Parol evidence is admissible to show when the power of sale became absolute. Jackson *v.* Lawrence, 117 U. S. 679.

[7] Græme *v.* Cullen, 23 Gratt. (Va.) 266.

defined, they rest largely in his discretion, and it is presumed that he will exercise them for the best interests of the *cestui que trust.*[1] Thus the deed usually designates the place of sale and the character of the notice of it to be given; but if the deed leaves these matters to the discretion of the trustee, a sale by him in the honest exercise of his judgment will be sustained.[2]

Under a trust deed made to secure a loan, with authority to the trustee to take possession of the property and sell it upon thirty days' notice, the authority to sell is for the benefit of the creditor, and may be exercised at the discretion of the trustee. He is not bound to sell within the time named, or at all, unless by direction of a court of equity. In the mean time it is his right and duty to take possession, and to apply the rents and profits to the payment of the debt. The object of the trust is to enable the creditor to make his money out of the property, and therefore its provisions are to be construed and applied with a view to that end.[3]

1779. What is a sufficient power. — A provision in a mortgage that if the mortgagor "shall fail to make the payment the said mortgagee shall advertise twenty days, and sell enough of the estate herein conveyed to him to pay said amount then due, and the said mortgagor shall have the right to direct what shall be sold," is a sufficient power of sale, and may be executed without the aid of a court of equity.[4] The power of sale may even be contained in a deed of the land to the debtor. A stipulation in such deed that if the grantee fail to pay the notes given for the purchase money when due, the sheriff of the county acting at the time of default shall sell the land, give title to the purchaser, and pay the money to the grantor, or to the assignee or holder of any of the notes, confers a valid power of sale upon the sheriff, although the title to the land is in the grantee.[5]

1780. Acceptance of trust. — It is not requisite to the validity of a power in a trust deed that the person who is to execute the power shall signify his willingness to do so by joining in the deed, or by any formal writing.[6] Although the deed be delivered to the *cestui que trust*, and the trustee never has possession of it, yet his acting under the trust by advertising the property for

[1] Ingle *v.* Culbertson, 43 Iowa, 265.

[2] Ingle *v.* Culbertson, *supra.*

[3] Walker *v.* Teal, 7 Sawyer, 39.

[4] Hyman *v.* Devereux, 63 N. C. 624.

[5] Moore *v.* Lackey, 53 Miss. 85.

[6] Leffler *v.* Armstrong, 4 Iowa, 482; Hipp *v.* Huchett, 4 Tex. 20; Flint *v.* Clinton Co. 12 N. H. 430, 432.

sale is an acceptance of the trust by him.[1] Neither is it necessary that the *cestui que trust* should signify his assent by any formal writing. The deed being for his benefit, his assent is presumed.[2]

1781. An obvious error on the face of the power, such as a recital that "the party of the first part," who, according to the phraseology of the deed, was the mortgagor, should proceed to sell, does not invalidate the power, when it appears from the whole instrument that the intention was to confer a power of sale on the mortgagee.[3]

1782. Under a power in default of payment to "enter and take possession of said premises immediately, and sell and dispose of the same," the entry and possession are not generally considered a condition precedent to the exercise of the power of sale, though it has been held that under such a provision[4] a sale cannot be made without a previous entry and taking possession, or at least a demand for possession and a refusal;[5] but it is not necessary that the mortgagee should enter upon the premises at any other time, or in any other manner, than at the time of the sale and for the purposes of the sale. Such entry is authorized to enable the sale to be made upon the premises.[6]

1783. The fact that a mortgagee has made an entry for foreclosure, and taken rents and profits which are insufficient to discharge the debt, does not prevent his making a valid sale under a power of sale in the mortgage. The rents and profits received go to reduce the amount of the mortgage debt.[7]

1784. As against the mortgagor a sale under a power is good although the mortgage or the power has not been recorded;[8] though now in several states, in which the exercise of the power of sale is regulated by statute, it is provided that the mortgage or power shall be recorded. Under such provisions, if the premises consist of distinct lots situated in two or more counties, the mortgage must be recorded in each county, or the sale

[1] Crocker *v.* Lowenthal, 83 Ill. 579.

[2] Shearer *v.* Loftin, 26 Ala. 703.

[3] Gaines *v.* Allen, 58 Mo. 537.

[4] Vaughan *v.* Powell (Miss.), 4 So. Rep. 257; Kiley *v.* Brewster, 44 Ill. 186.

[5] Roarty *v.* Mitchell, 7 Gray (Mass.), 243; followed in Foster *v.* Boston, 133 Mass. 143. If the deed makes entry and possession a condition precedent, this cannot be satisfied by a demand for possession. Vaughan *v.* Powell, *supra*, per Campbell, J.

[6] Cranston *v.* Crane, 97 Mass. 459.

[7] Montague *v.* Dawes, 12 Allen (Mass.), 397. And see § 1268.

[8] Wilson *v.* Troup, 2 Cow. (N. Y.) 195; Jackson *v.* Colden, 4 Cow. (N. Y.) 266.

will be invalid as to the part in the county in which there was no record.[1] A valid sale may be made by the assignee of a mortgage containing a power of sale, although the assignment is not recorded till after the sale, if nobody is thereby misled.[2]

1785. Who may exercise the power. — In general any person in whom the legal estate or title under the mortgage is vested may sell under the power. So long as the mortgagee retains the mortgage the power must be exercised by him; and when it has been wholly assigned the assignee must exercise it.[3] An assignee to whom a mortgage has been assigned solely for the purpose of collecting the mortgage debt may exercise the power of sale.[4] So long as the power be exercised by the legal holder of the mortgage, it is not material whether he exercises it for his own benefit or that of some other party in interest.[5] If upon the face of the assignment it appears that it has been assigned only in part, the mortgagee and assignee should join in the sale.[6] But to create a valid power, or to make a valid execution of it, one must have a legal capacity to act and contract, and one under any legal disability, such as minority, can do neither.[7] A married woman may make a good power, or a valid execution of one.[8]

A deed of trust with a power of sale made to a sheriff and his successors in office is construed as conferring a power not upon the sheriff in his individual capacity, but in his official capacity, and his successors in office may execute it.[9]

A trust deed may properly provide for a successor in the trust who may exercise the power of sale in the absence of the trustee first named, or in case of his refusal to act, and in such case a successor appointed in the manner provided is clothed with all the power to make the sale which the trustee first named was invested with.[10]

A mortgage was made to secure a debt to a partnership, one of the partners in which had died and the other partner was then

[1] Wells *v.* Wells, 47 Barb. (N. Y.) 416.

[2] Montague *v.* Dawes, 12 Allen (Mass.), 397.

[3] Cohoes Co. *v.* Goss, 13 Barb. (N. Y.) 137; McGuire *v.* Van Pelt, 55 Ala. 344.

[4] Russum *v.* Wanser, 53 Md. 92; Buell *v.* Underwood, 65 Ala. 285.

[5] Lee *v.* Clary, 38 Mich. 223.

[6] Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 231.

[7] Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35.

[8] Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129; Doolittle *v.* Lewis, 7 Johns. (N. Y.) Ch. 45; Young *v.* Graff, 28 Ill. 20.

[9] Beal *v.* Blair, 33 Iowa, 318; White *v.* Stephens, 77 Mo. 452; § 1771.

[10] Irish *v.* Antioch College (Ill.), 18 N. E. Rep. 768; Lake *v.* Brown, 116 Ill. 83.

his administrator. The consideration was stated to be paid by the surviving partner and the estate of the deceased partner, and the same form was used in designating the grantees; and a power of sale was given to "said grantees." It was held that the surviving partner as administrator was sufficiently designated as one of the grantees; that the whole legal title was vested in him, one half to his own use, and the other as administrator; and that his omission to describe himself as administrator in a deed given in execution of the power to sell did not invalidate the deed.[1]

Upon the death of a mortgagee holding a mortgage, it can only be foreclosed by his executor or administrator. A foreclosure by a notice of sale purporting to be in the name of the deceased mortgagee, or by his authority, is void, and the notice cannot be made effectual by proof that it was really the act of a person who claimed to have purchased the note and mortgage, although the mortgagee had not indorsed the note, nor assigned the mortgage.[2]

1786. A power of sale may be executed by the executor or administrator of the mortgagee, although in terms the power is given only to him, "his heirs or assigns."[3] The power being coupled with an interest passes to any one in whom the mortgagee's estate becomes vested, whether by assignment in fact or in law. It does not matter that the appointment of the executor or administrator is made in another state, as the power is a matter of contract and not of jurisdiction, although for the purpose of making the record title complete an appointment in the state where the land is situated is essential.[4] A surviving executor or administrator, if he retains authority under the will or by law to go on with the administration of the estate, may sell under the power.

1787. A legal assignment of the mortgage passes the power of sale unless there are words of restriction.[5] It does not matter

[1] Look *v.* Kenney, 128 Mass. 284.

[2] Bausman *v.* Kelley (Minn.), 36 N. W. Rep. 333.

[3] Lewis *v.* Wells, 50 Ala. 198; Harnickell *v.* Orndorff, 35 Md. 341; Berry *v.* Skinner, 30 Md. 567, 573; Collins *v.* Hopkins, 7 Iowa, 463; Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129, 145; Johnson *v.* Turner, 7 Ohio, 568; Mervin *v.* Lewis, 90 Ill. 505. So in **North Carolina.** Laws 1887, ch. 147.

[4] Doolittle *v.* Lewis, 7 Johns. (N. Y.) Ch. 45; Averill *v.* Taylor, 5 How. (N. Y.) Pr. 476; Sloan *v.* Frothingham, 65 Ala. 593; Hayes *v.* Frey, 54 Wis. 503.

[5] Bush *v.* Sherman, 80 Ill. 160; Cohoes Co. *v.* Goss, 13 Barb. (N. Y.), 137; Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48;

that the assignment, though absolute in form, is in fact a security for a debt due from the mortgagee; but although such assignee may foreclose in the same way as any assignee, yet, if he purchases at the sale, the mortgagee may redeem.[1] If by concurrence of the mortgagor the time of payment is extended, or the terms are otherwise changed,[2] the power remains unimpaired. The assignment of the note does not prevent a foreclosure in the name of the mortgagee for the use of the assignee.[3] But if the mortgagee commences the advertisement under the power, and before the sale assigns the mortgage to a third person, who continues the advertisement in the mortgagee's name instead of advertising anew, the sale is irregular and void.[4] An assignment which is not effectual either at common law or by statute, as, for instance, one made by an informal indorsement without any transfer of the note, does not operate to pass the power of sale to the assignee, but leaves it still in the mortgagee.[5]

The power of sale is usually vested in the mortgagee, "his executors, administrators, or assigns." If it is not given to his "assigns," then one who has taken a transfer of the mortgage cannot exercise it,[6] although the deed empowers the "assigns," amongst others, to give a receipt for the purchase moneys obtained by such sale.[7] Where the power is to "assigns," a devisee of the mortgagee can exercise it; though he cannot if these words are omitted.[8] The word "assigns" is not regarded as meaning merely the persons whom the mortgagee may during his lifetime make such, but as meaning as well those whom he or his transferee may make such by will.[9]

An assignee of part of the mortgage notes with an assignment of the mortgage, or so much thereof as secures the payment of the

Bergen *v.* Bennett, 1 Caines (N. Y.) Cas. 1; Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 236; Pease *v.* Pilot Knob Iron Co. 49 Mo. 124; Pickett *v.* Jones, 63 Mo. 195; Harnickell *v.* Orndorff, 35 Md. 341; McGuire *v.* Van Pelt, 55 Ala. 344.

[1] Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48.

[2] Young *v.* Roberts, 15 Beav. 558.

[3] Bourland *v.* Kipp, 55 Ill. 376.

[4] Niles *v.* Ransford, 1 Mich. 338; Bausman *v.* Kelley (Minn.), 36 N. W. Rep. 333.

[5] Hamilton *v.* Lubukee, 51 Ill. 415.

[6] Dolbear *v.* Norduft, 84 Mo. 619.

[7] Bradford *v.* Belfield, 2 Sim. 264; Townsend *v.* Wilson, 1 Barn. & Ald. 608; Woonsocket Inst. for Sav. *v.* Am. Worsted Co. 13 R. I. 255.

In England it is now a common precaution to vest the power of sale also in all persons entitled to give a receipt for the mortgage debt. Fisher's Mortg. p. 504.

[8] Cooke *v.* Crawford, 13 Sim. 91; Macdonald *v.* Walker, 14 Beav. 556; Wilson *v.* Bennett, 5 De G. & S. 475.

[9] Titley *v.* Wolstenholme, 7 Beav. 425.

notes assigned, has an implied right to avail himself of the power of sale to collect the notes assigned.[1]

1788. In respect to the assignment of deeds of trust a different rule prevails, however. The trustee is a mere instrument to execute the purpose of the grantor, and he is clothed with the legal estate merely for this purpose. The trust is a confidence which cannot be delegated except as provided by the persons who created the trust; and a provision for this purpose must be express and beyond question. Therefore it has been held that a trust deed to two persons, or the survivor of them, and the heirs and *assigns* of the survivor, could not be executed by another to whom the survivor conveyed the property, as the word "assigns" does not with certainty mean a person whom the trustee might make such by his own act during his life.[2]

1789. An equitable assignee cannot execute the power. — The power must be strictly pursued, and it is presumed that the delegation of the power is induced by trust and confidence in the trustee. If the mortgage does not provide that an assignee may execute the power, the law does not confer it upon the assignee, and it can only be exercised by the mortgagee.[3] It may be exercised by an assignee if the power so provides, and the assignee is the legal assignee of the debt and mortgage.[4] But if the debt be not evidenced by an instrument assignable by law, nor in any way except by the mortgage itself, which is not assignable except in equity, then the mere assignment of the mortgage, as the courts of Illinois hold, passes only an equitable title to the debt, and the power does not pass to the assignee, and can be executed only by the mortgagee himself.[5] An assignee of the note alone cannot execute the power.[6] If the debt is of such a character that it may be legally assigned, so as to vest the legal title in the assignee, then the assignee himself must execute the power.[7] The legal assignee may make the sale in his own name, but the

[1] Brown *v.* Delaney, 22 Minn. 349.

[2] Whittelsey *v.* Hughes, 39 Mo. 13; McKnight *v.* Wimer, 38 Mo. 132; and see Pickett *v.* Jones, 63 Mo. 195, 199; Johnson *v.* Johnson (S. C.), 3 S. E. Rep. 606.

[3] Flower *v.* Elwood, 66 Ill. 438; Wilson *v.* Spring, 64 Ill. 14.

[4] Heath *v.* Hall, 60 Ill. 344; Dill *v.* Satterfield, 34 Md. 52; Berry *v.* Skinner, 30 Md. 573.

[6] Mason *v.* Ainsworth, 58 Ill. 163; Hamilton *v.* Lubukee, 51 Ill. 415. See § 862.

[6] Cushman *v.* Stone, 69 Ill. 516.

[7] Pardee *v.* Lindley, 31 Ill. 174; Strother *v.* Law, 54 Ill. 413; Sargent *v.* Howe, 21 Ill. 148; Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 197; Vansant *v.* Allmon, 23 Ill. 30.

equitable assignee cannot.[1] Such assignee can avail himself of his assignment only in proceedings in equity.[2]

1790. A power in a mortgage or a trust deed to two or more jointly must be executed by all the donees. But if it provide that the grantees "or either of them" may sell, then the power may be exercised by one alone.[3] It is the better practice, however, for the persons having a joint interest in a mortgage to join in the execution of the power of sale.[4] If there be two or more joint mortgagees or trustees, the power should be extended to the survivors and survivor of them, and the executors or administrators of such survivor, or their or his assigns. When the deed is without this provision for survivorship, on the death of one of the grantees, his executor or administrator must join in the execution of the power;[5] unless it appear otherwise from the deed that the interest was a joint one, and that the intention was that the security with all the advantage of the power should vest in the surviving mortgagee.[6]

The execution of the trust may be confided to one person alone, or to two or more jointly, or to two or more jointly and severally. If it be to several jointly, all must act in the execution of it; but if it be to them severally, or to either of them, then one alone may execute the trust. The deed itself is the authority for the execution of the trust, and it may contain such provisions about the execution of the trust as the parties see fit to make.[7] If the trust or power be given to two or more, it is joint unless there be words added which make it several also, or which show the grantor's intention to confide the execution of it to any number less than the whole. But upon the death of one or more of several trustees, under a deed of trust, the survivors take the entire legal estate, and may execute the trust, although there be no express provision to this effect in the deed.[8] Upon the death of the last trustee the title vests in his heir, until the appointment of a new trustee by the court.[9] The estate is generally

[1] Cushman *v.* Stone, 69 Ill. 516.

[2] Olds *v.* Cummings, 31 Ill. 188; Mason *v.* York & Cumberland R. R. Co. 52 Me. 82.

[3] Loveland *v.* Clark (Colo.), 18 Pac. Rep. 544.

[4] Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 331; White *v.* Watkins, 23 Mo. 423; Powell *v.* Tuttle, 3 N. Y. 396.

[5] Townsend *v.* Wilson, 3 Madd. 261.

[6] Hind *v.* Poole, 1 Kay & J. 383; *S. C.* 1 Jur. (N. S.) 371.

[7] Græme *v.* Cullen, 23 Gratt. (Va.) 266; Taylor *v.* Dickinson, 15 Iowa, 483.

[8] Hannah *v.* Carrington, 18 Ark. 85; Franklin *v.* Osgood, 14 Johns. (N. Y.) 527.

[9] Greenleaf *v.* Queen, 1 Peters, 138; Maulden *v.* Armistead, 14 Ala. 702, 708.

regarded as vesting in the new trustee by the appointment without a conveyance.[1]

1791. A first and second mortgagee may concur in a sale. In a case where this course was pursued, objection was taken that the title under such sale was not marketable, because it was not clear under which power the property had been sold; but the Master of the Rolls said that as either mortgagee alone might have sold under his power, there was no reason why they could not combine together and sell.[2]

A trustee holding two deeds of trust executed by the same person for the benefit of the same creditor, each deed being for an undivided half of the land, should sell the whole together under both deeds, and not an undivided half under each deed at different times, as the presumption is that the property would command a better price if sold entire.[3]

IV. *Revocation or Suspension of the Power.*

1792. The death of the mortgagor does not revoke a power of sale.[4] This being coupled with an interest in the estate cannot be revoked or suspended by the mortgagor. Of course, after his death the power cannot be exercised in his name, but the authority to execute it in the name of the grantee continues. The execution of the power is the grantee's act by virtue of the power. It is not a mere power of attorney.[5] In Texas, although the general principle is recognized that such a power cannot be revoked, yet the exercise of it is regarded as inconsistent with the statutes respecting the settlement of the estates of deceased persons, which require liens upon their property to be enforced in the probate court. Therefore, upon the death of the mortgagor or grantor in a trust deed, or of a purchaser from either, while

[1] Duffy *v.* Calvert, 6 Gill (Md.), 487; Goss *v.* Singleton, 2 Head (Tenn.), 67; Gibbs *v.* Marsh, 2 Met. (Mass.) 243, 253.

[2] M'Carogher *v.* Whieldon, 34 Beav. 107.

[3] Coffman *v.* Scoville, 86 Ill. 300.

[4] Wright *v.* Rose, 2 S. & S. 323; Corder *v.* Morgan, 18 Ves. 344; Hunt *v.* Rousmanier, 8 Wheat. 174; *S. C.* 2 Mason, 244; Conners *v.* Holland, 113 Mass. 50; Varnum *v.* Meserve, 8 Allen (Mass.), 158; Brewer *v.* Winchester, 2 Allen (Mass.), 389; Bergen *v.* Bennett, 1 Caines (N. Y.) Cas. 1; Hodges *v.* Gill, 9 Bax. (Tenn.) 378; White *v.* Stephens, 77 Mo. 452.

[5] Strother *v.* Law, 54 Ill. 413; Collins *v.* Hopkins, 7 Iowa, 463; Berry *v.* Skinner, 30 Md. 567; Hyde *v.* Warren, 46 Miss. 13, 29; Beatie *v.* Butler, 21 Mo. 313; De Jarnette *v.* De Giverville, 56 Mo. 440, 448; Bradley *v.* Chester Valley R. R. Co. 36 Pa. St. 141, 151; Bell *v.* Twilight, 22 N. H. (2 Fost.) 500. See Mansfield *v.* Mansfield, 6 Conn. 559, for a case of a naked power from a debtor to creditor. Pardee *v.* Lindley, 31 Ill. 174.

holding the equity of redemption, the power cannot be exercised.[1] It then secures the creditor priority over such claims against the debtor's estate as by the statute he is entitled to in the due course of administration. Expenses of last sickness, of administration and management of the estate, allowances in lieu of homestead and other property exempt from forced sale, and the homestead right itself, though released by the wife in the mortgage, take precedence of the mortgage debt.[2] A mortgage or trust deed may thus become of no value, and is a security that does not secure.

1793. The insanity of the mortgagor cannot of course have any greater effect in revoking or suspending the power of sale than his death would have.[3] Neither does an application by a guardian or committee of the lunatic, for an order to sell the mortgaged premises for the benefit of his creditors, have any effect to deprive the mortgagee of this summary means of realizing his claim.[4] Of course, if the mortgagee or any one else takes an unjust and improper advantage of such condition of the mortgagor, this will be ground for setting aside the sale.[5]

Neither does the bankruptcy of the mortgagor affect the mortgagee's authority to execute the power either in the mortgagor's name and as his attorney, or in the mortgagee's own name; for the assignee takes subject to the rights of the mortgagee.[6]

1794. In some states where, by statute or adjudication, a mortgage is regarded as a mere security for debt, passing no title or estate to the mortgagee, a power of sale is regarded as not coupled with an interest, and it is revoked and rendered incapable of execution by the death of the mortgagor.[7] In Georgia, however, the power of sale is regarded as coupled with an interest and is irrevocable, just the same as it is where the common law doctrine, that the mortgage conveys the legal estate, still prevails.[8]

[1] Robertson *v.* Paul, 16 Tex. 472; Buchanan *v.* Monroe, 22 Tex. 537. So in Georgia: Lathrop *v.* Brown, 65 Ga. 312.

[2] McLane *v.* Paschal, 47 Tex. 365; Batts *v.* Scott, 37 Tex. 59. The allowance for homestead is not to exceed $5,000. Thompson on Homesteads, § 611. See, also, §§ 324–328 of same. No reliance should be placed upon a mortgage or deed of trust upon property in this state under its present laws.

[3] Encking *v.* Simmons, 28 Wis. 272.

[4] Berry *v.* Skinner, 30 Md. 567; Davis *v.* Lane, 10 N. H. 156.

[5] Encking *v.* Simmons, *supra.*

[6] Hall *v.* Bliss, 118 Mass. 554; Dixon *v.* Ewart, 3 Meriv. 321; Story on Agency, § 482.

[7] Johnson *v.* Johnson (S. C.), 3 S. E. Rep. 606; Darrow *v.* St. George (Colo.), 9 Pac. Rep. 791.

[8] Calloway *v.* People's Bank of Bellefontaine, 54 Ga. 441 (1875). In this case the subject is ably considered by Mr. Justice McCay: "Our blended system of law and equity makes of a mortgage what it, in fact, is in practice, notwith-

1795. A power may be modified and extended without revoking it. A mortgage deed contained a power of sale providing that if default should be made in payment of the interest, or any part of it, for a month after it became due, or in the payment of the principal on the appointed day, then the mortgagee might sell. After it became due he called for payment, and the mortgagor arranged with other parties for a loan of the money upon an assignment of the mortgage, which was executed with a recital that in the mortgage "a power of sale is contained for the better securing of the principal sum and interest, but the said power has not been, and is not intended to be, exercised," and reciting the calling in of the mortgage moneys and the mortgagor's arrangement with the assignees to loan the amount. The assignment, which was by an indenture executed by all the parties, confirmed the moneys "and all powers and remedies for recovering the same sums respectively," and conveyed the estate in fee subject to redemption. The time of payment was extended seven years, and the assignees covenanted that no sale should be made without three months' notice. There was a power of sale to arise upon default. On account of intervening incumbrances it was desirable, on a subsequent default, to sell under the power in the original mortgage rather than that in the assignment. It was held that the recitals were not intended to extinguish the original power, but only to modify and postpone the exercise of it; and that a sale could be made under it.[1]

standing the formal rules of law. Neither this court nor the Code has said that the mortgagee has no interest. The language is, it passes no title. This was true in equity in England, and yet a mortgagee was constantly recognized as having an interest, and an interest, too, in the land. So far as that interest was concerned, he was treated as a purchaser, and not as a general creditor, even by judgment. . . . We see nothing in this declaration of the Code, that a mortgage is only a security, that negatives the idea that a power to sell in a mortgage is a power coupled with an interest. The two ideas are just as consistent and harmonious as the idea of the English Chancery Court, as to the nature of a mortgage, was with a power of sale. Indeed, it is mainly in chancery courts, all of which treat a mortgage as only a security, and uniformly recognize the property to belong to the mortgagor, that the whole doctrine of powers to sell attached to a mortgage is expounded and announced." In a previous case in the District Court of the United States for Northern Georgia, Locket *v.* Hill, 1 Woods. 552 (1873), the judge, in view of the Code and decisions of the state, that a mortgage passes no title, and is only a security for a debt, argued that the power of sale is not coupled with an interest, but is a collateral power only, and expires with the life or bankruptcy of the mortgagor.

[1] Boyd *v.* Petrie, L. R. 7 Ch. App. 385. Though in England it is usual in the transfer of a mortgage to provide expressly for the continuance of the power, this is not essential, as a general assign-

1796. A conveyance by the mortgagee of a part of the premises is no waiver of his right to sell under the power. A mortgagee, under a mistaken belief that he was the absolute owner, having conveyed a part of the mortgaged premises by deed with covenants of warranty, was held nevertheless to possess the right to foreclose the mortgage under a power of sale, because his conveyance did not amount to an assignment of the mortgage, and the purchaser took the title subject to the mortgage.[1] If he should himself become the purchaser under the power of sale, he would be estopped to claim, as against his grantee under his deed of warranty, the land so conveyed by him. A conveyance in the same way of the whole estate would doubtless be held to be an assignment of the mortgage which would carry with it the power. Neither does a mortgagee waive his right to sell by an entry to foreclose, and the taking of rents and profits insufficient to pay the debt.[2] The power to sell generally continues so long as the debt remains unpaid.

1797. The pendency of a bill to redeem by a subsequent incumbrancer would not, it would seem, suspend the power to sell;[3] for in this way the very object of the power, which is to afford a speedy remedy without the delay of a suit, would be defeated. The incumbrancer may protect himself by purchasing at the sale; or by enforcing his claim upon the surplus proceeds of the sale, when his title can be fully investigated, without keeping the mortgage creditor waiting for his money. But when the first mortgagee has refused a tender of the amount due on his mortgage from a subsequent mortgagee, who thereupon brought a suit to redeem, and the first mortgagee proceeded to sell under his power, upon a *primâ facie* case that the subsequent mortgagee was entitled to redeem, the first mortgagee was restrained from assigning his mortgage, and from selling under it, until the hearing of the case on the bill to redeem.[4]

The power of sale is not suspended for the reason that the mortgagee has resorted to a process of garnishment to collect the mortgage debt. The several remedies upon a mortgage being collateral and independent, the remedy under the power of sale is not af-

ment of all covenants and securities will carry it. Young *v.* Roberts, 15 Beav. 558.

[1] Wilson *v.* Troup, 2 Cow. (N. Y.) 195.

[2] Montague *v.* Dawes, 12 Allen (Mass.), 397.

[3] Adams *v.* Scott, 7 W. R. 213.

[4] Rhodes *v.* Buckland, 16 Beav. 212.

fected by any other proceeding to enforce the debt, unless this has resulted in a partial or complete satisfaction of it.[1]

1798. A tender of the amount due and payable upon a mortgage, after breach of the condition and before the sale, does not, according to the rule adopted in Massachusetts, defeat the right to sell under the power, because the right to sell attaches at once, and as it is a power coupled with an interest it cannot be revoked. The tender is merely the foundation for a suit in equity for redemption. A sale under the power, after a tender made and not accepted, transfers the legal title and possession; but the mortgagor may preserve his right to redeem against a purchaser by giving him notice before or at the sale of the tender. Until he is restored to the legal right of possession by a decree of court in equity, he can neither maintain nor defend a writ of entry against one claiming under the mortgage. The foreclosure is complete by the sale notwithstanding the tender. And unless the mortgagor proceeds in equity to redeem, the purchaser is entitled to possession and may recover it by a writ of entry, although he purchased with full knowledge that after breach and before the sale the mortgagor tendered the whole amount due under the mortgage.[2] If, however, a tender be made at the time stipulated in the condition of the mortgage, the right to sell is thereby defeated, and a sale would be void.[3]

1799. A different rule is adopted in the English courts, and in some of our state courts, which hold that upon a tender at any time before the sale is actually made, even after the property has been put up at public auction, the mortgagee is bound to stop the sale.[4] If the mortgagee refuses the tender and goes on with the sale, the purchaser having knowledge of these circumstances, the court, instead of leaving the mortgagor to his remedy by bill to redeem, will set aside the sale. In other similar cases the court will restrain a sale and allow the mortgagor or other person interested in the equity to proceed with a bill to redeem. But a mere offer without an actual tender of the amount due is not sufficient to prevent a sale; and the tender must include costs

[1] Benjamin *v.* Loughborough, 31 Ark. 210.

[2] Cranston *v.* Crane, 97 Mass. 459; and see Montague *v.* Dawes, 12 Allen (Mass.), 397.

[3] §§ 886–893.

[4] Jenkins *v.* Jones, 2 Gif. 99; *S. C.* 6 Jur. N. S. 391; Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35; Cameron *v.* Irwin, 5 Hill (N. Y.), 272, 276. In New York and Michigan the lien is considered as discharged by the tender, so that no valid sale can afterwards be made even to a *bonâ fide* purchaser. § 893.

as well as interest.[1] A mortgagor who has notice of an intended sale and allows it to proceed without objection, cannot afterwards show a tender, or even a payment in full of the debt, and thereby defeat the title of a *bonâ fide* purchaser, who purchased in good faith without knowledge of the payment or tender; the mortgage remained undischarged of record.[2] But payment extinguishes the power of sale except as against a mortgagor or other party in interest who is estopped to take advantage of it.[3]

Where it is provided in a deed of trust that upon any default the whole amount of principal and interest shall be due forthwith, and the trustee may thereupon sell, the debtor is in equity entitled to have proceedings for a sale stopped upon a tender to the trustee before sale of the amount due, together with costs accrued; and if the trustee proceeds nevertheless to sell, the sale may be set aside.[4]

1800. The power is not suspended by reason that the mortgagor is within the lines of an enemy at war with his country, if he voluntarily absented himself from home and became an alien enemy.[5] The publication of notice in accordance with the power is binding and effectual. Upon the same principle, an alien enemy who has voluntarily absented himself from home may be sued in the state of his former residence, and is bound by constructive notice in the same manner as any other non-resident. The late civil war in this country was attended with all the consequences in this respect that an international or public war

[1] Whitworth *v.* Rhodes, 20 L. J. N. S. (Ch.) 105. See Grugeon *v.* Gerrard, 4 Y. & C. 119.

[2] Warner *v.* Blakeman, 36 Ib. 501; affirmed, 4 Keyes, 487; Merchant *v.* Woods, 27 Minn. 396. See §§ **892, 1450, 1512.**

[3] Lycoming F. Ins. Co. *v.* Jackson, 83 Ill. 302; Redmond *v.* Packenham, 66 Ill. 434; Cameron *v.* Irwin, 5 Hill (N. Y.), 272.

[4] Whelan *v.* Reilly, 61 Mo. 565; Flower *v.* Elwood, 66 Ill. 438.

[5] Ludlow *v.* Ramsey, 11 Wall. 581. Mr. Justice Bradley said: "This case differs from that of Dean *v.* Nelson, 10 Wallace, 158, decided at the present term. In that case Nelson and his wife were driven out of Memphis by a military order, and were not permitted to return, and the proceedings to foreclose their property took place during their enforced absence. The other defendant, May, was only nominally interested, and had always been within the Confederate lines. But if, as in this case, a party voluntarily leaves his country or his residence for the purpose of engaging in hostilities against the former, he cannot be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return or to hold communication with the place where the proceedings are conducted."

That the existence of civil war did not exempt property of persons residing in the rebel states, located in the loyal states, from judicial process, and foreclosure or sale under power of sale, for debts due to citizens of the latter states, see, also,

would have produced. The fact that a mortgagor was so situated within the enemy's lines that he could not receive the notice of sale, or appear in response to it, did not suspend the right of the mortgagee to enforce payment of his mortgage in accordance with its provisions.[1] In numerous cases it would be equally impossible, for other reasons, for the mortgagor to receive notice by publication.

Aside from the principle above stated as to the right to foreclose the property of alien enemies, the power of sale in a mortgage or trust deed being coupled with an interest and irrevocable may, at any time after the happening of the contingency in which it is to be exercised, be executed without regard to the circumstances or disabilities of the maker of it at that time.[2] Immediately upon the happening of that contingency, it is the legal and moral right of the creditor to have the power of sale made for his benefit executed. The notice of sale required by the power is not for the benefit of the grantor, in the sense of a notice to him of the sale of the land; for if that were the case, he could altogether defeat any sale by going to a place where the

Washington University *v.* Finch, 18 Wall. 106; *S. C.* 1 Cent. L. J. 66 (1874); De Jarnette *v.* De Giverville, 56 Mo. 440; Martin *v.* Paxson, 66 Mo. 260; Harper *v.* Ely, 56 Ill. 179; Thomas *v.* Mahone, 9 Bush (Ky.), 111; Crutcher *v.* Hord, 4 Ib. 360; Seymour *v.* Bailey, 66 Ill. 288; Willard *v.* Boggs, 56 Ill. 163; Mixer *v.* Sibley, 53 Ill. 61; Hall *v.* Conn. Mut. L. Ins. Co. 68 Ill. 357; Bush *v.* Sherman, 80 Ill. 160; Mitchell *v.* Nodaway Co. 80 Mo. 257.

[1] Dorsey *v.* Dorsey, 30 Md. 522. After the decision of this case the case of Johnson *v.* Robertson, 34 Md. 165, came before the court, when, in consequence of the decision of the Supreme Court of the United States in Dean *v.* Nelson, 10 Wall. 158, the court overruled its former decision in Dorsey *v.* Dorsey, and held that a notice by publication to the mortgagor, while absent in the Confederate lines, was ineffectual to bind him, and that the sale under it was void. If the decision in Ludlow *v.* Ramsey, 11 Wall. 581, had then been made, the Supreme Court of Maryland would doubtless have adhered to its former decision.

[2] Washington University *v.* Finch, *supra;* De Jarnette *v.* De Giverville, *supra.* Both of these cases relate to sales made by trustees under powers given in trust deeds while the grantors were alien enemies in the rebel states. In the former case Mr. Justice Miller said: "The debt was due and unpaid. The obligation which the trustee had assumed on a condition had become absolute by the presence of that condition. If the complainants had been dead, the sale would not have been void for that reason. . . . If they had been in Japan, it would have been no legal reason for delay. . . . The enforced absence of the complainants, if it be conceded that it was enforced, does not, in our judgment, afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed on him before the war began." In the latter case, Wagner, Judge, said: "So far as the authority of the trustee was concerned to go on and make a sale of the property in satisfaction of the debt, it made no difference whether the grantors were in the Confederate lines or in the jungles of India, or even if they were dead."

notice could not reach him; but it is intended rather to notify the community that the sale will take place. The grantor must be presumed to know that he is in default, and that his property is liable to be sold.

V. *When the Exercise of the Power may be enjoined.*

1801. Generally, the purpose for which the power of sale is given being to afford an additional and more speedy remedy for the recovery of the debt, the mortgagor is by his contract bound to exercise the necessary promptness in fulfilling it, and cannot complain of a legitimate exercise of the power.[1] If in any case it is attempted to pervert the power from its legitimate purpose, and to use it for the purpose of oppressing the debtor, or of enabling the creditor to acquire the property himself, a court of equity will enjoin the sale, or will set it aside after it is made.[2] Of course, so long as the creditor exercises only his legal right, although this be contrary to the wishes and interest of the mortgagor, the court will not interfere to enjoin a sale;[3] and, as will be noticed presently more at length, a stronger case must be made to call for such interference than to set aside the sale afterwards.[4]

A court of equity, having once acquired jurisdiction of the parties and of the subject matter through an action to enjoin a sale, may direct a sale of the land; and it is not bound to direct such sale in strict accordance with the terms of the mortgage.[5]

[1] § 1447; "Such a power as this may no doubt be used for purposes of oppression; but when conferred, it must be remembered that it is so by a bargain between one party and another, and it is for the party who borrows to consider whether he is not giving too large a power to him with whom he is dealing." Per Cottenham, Lord Chancellor, in Jones *v.* Matthie, 11 Jur. 504.

[2] Davey *v.* Durrant, 1 De G. & J. 535; Robertson *v.* Norris, 1 Gif. 421; Jenkins *v.* Jones, 2 Gif. 99; Whitworth *v.* Rhodes, 20 L. J. N. S. (Ch.) 105; Close *v.* Phipps, 7 Man. & G. 586.

"Wherever a power is given," said Sir J. Stuart, V. C., in Robertson *v.* Norris, 4 Jur. N. S. 155, "the court requires that the power shall be exercised with a view only to that which is the legitimate purpose for effecting which the power was conferred. The legitimate purpose for which the power to sell in this defendant's mortgage deed was given was to secure to him repayment of his mortgage money. If he uses the power to sell which he gets for that purpose for another purpose, from any ill motive, to effect means and purposes of his own, or to serve the purposes of other individuals, the court considers that to be what it calls a fraud in the exercise of the power, because it is using the power for a purpose foreign to the legitimate purposes for which it was intended." See *S. C.* affirmed, Ib. 443.

[3] Jones *v.* Matthie, *supra;* Security Loan Asso. *v.* Lake, 69 Ala. 456, quoting text.

[4] Struve *v.* Childs, 63 Ala. 473.

[5] Manning *v.* Elliott, 92 N. C. 48.

1802. Legitimate exercise of power. — It frequently happens that the holder of a mortgage with a power of sale is requested by the mortgagor, or some other party in interest, to exercise it for the purpose of effecting a sale of the property; as when the title subsequent to the mortgage has become complicated by attachments, judgments, or other liens, so that it is not practicable to obtain releases from all persons having claims upon it; or where a sale, except under the power, has become impracticable because the subsequent liens upon it are greater than the value of the property. Sometimes, under these or like circumstances, a default is designedly permitted, in order to make the power exercisable and to cut off subsequent incumbrances. Doubts are sometimes expressed about the validity of sales made on such request, or with the knowledge on the part of the mortgagee that the purpose is to get rid of a subsequent lien; but it is conceived that if the power is fairly exercised according to its terms, there is no impropriety in the arrangement. Certainly there is no such objection as to give occasion for the interference of the court to restrain the sale or to set it aside. "A man taking that which belongs to him, by means of the security which he has contracted for, does not act improperly in so doing merely because one principal reason for his calling in the money is a wish to benefit another person. The case, however, might be different if it were part of the arrangement that the mortgage debt should be again lent to the purchaser." [1]

So long as the mortgagee is clearly within the authority given by the power, an intended sale will not be restrained although the exercise of it be harsh and improvident. The grounds for interference by injunction must be very strong, and must show that the injury likely to be sustained by the parties interested will be irreparable, or that a clear breach of trust will be committed by the intended sale.[2]

1803. A use of the power to obtain an advantage under another mortgage is not allowable. Where a mortgagee held two mortgages with powers of sale upon the same property, the subsequent mortgage, however, being of an undivided interest, and he threatened to foreclose under the first mortgage unless both mortgages should be paid, upon the filing of a bill to re-

[1] Dart's Vendors & Purchasers, 5th ed. p. 75.

[2] Kershaw *v.* Kalow, 1 Jur. N. S. 974; Bedell *v.* M'Clellan, 11 How. (N. Y.) Pr. 172.

deem from the first mortgage, and the payment of the money due upon it into court, he was enjoined from selling under that mortgage; because the power in that mortgage only existed for the purpose of securing that money, and the mortgagee could not be allowed to proceed under that power in order to have an advantage in obtaining the money due on the second mortgage.[1]

1804. Grounds of interference must be alleged. — Courts of equity will interfere by injunction to prevent a sale under a power in a mortgage or trust deed, when by reason of fraud, want of consideration, or otherwise, the collection of the debt would be against conscience, and the sale would work a great and irreparable injury.[2] To warrant this interference the complainant must allege specifically the grounds on which the application is based; general statements and inferences from facts are not sufficient.[3] An allegation that the mortgagor does not owe the note described in the mortgage, without stating why he does not owe it, is not sufficient to warrant the relief.[4] A statement that the proposed sale will materially embarrass and injure the petitioner is only a conclusion of his own, and of no consequence unless the facts are stated from which the court can determine what the injury will be.[5] There must be clear and precise allegations of distinct facts which would go to show that by reason of fraud, or want or illegality of consideration, the collection of the mortgage debt would be against good conscience, and that the sale would work irreparable injury.[6]

1805. The court will enjoin a sale only when the petitioner's rights are clear, or free from reasonable doubt. He must show also a good reason for asking the interference of the court. He must show that the mortgagee is about to proceed in an improper or oppressive manner, and not merely that he might adopt a different remedy;[7] that the mortgage creditor is claiming more than is due on the debt; or that the accounts are so complicated that the parties cannot state them and ascertain the amount due.[8] In general a stronger case must be presented to the court, to

[1] Whitworth *v.* Rhodes, 20 L. J. N. S. 105.

[2] Montgomery *v.* McEwen, 9 Minn. 103.

[3] Security Loan Asso. *v.* Lake, 69 Ala. 456, 465.

[4] Foster *v.* Reynolds, 38 Mo. 553.

[5] Montgomery *v.* McEwen, *supra.*

[6] Vaughan *v.* Marable, 64 Ala. 60; Whitaker *v.* Hill (N. C.), 1 S. E. Rep. 639.

[7] Bedell *v.* M'Clellan, 11 How. (N. Y.) Pr. 172; Security Loan Asso. *v.* Lake, *supra.*

[8] Security Loan Asso. *v.* Lake, *supra;* Hinson *v.* Brooks, 67 Ala. 491; Muller *v.* Stone (Va.), 6 S. E. Rep. 223.

obtain an injunction against a proposed sale under the power than to obtain a decree setting it aside after it is made.[1]

An injunction will not be issued against carrying out a sale made under a power, when this relief is not sought until the sale has been made, and the rights of a purchaser have intervened. If the mortgagor has not obtained an injunction before the sale, he should attend the sale and apprise the bidders of his claims, in order to be in a situation to avail himself of his supposed equities.[2]

1806. Payment of the amount justly due under the mortgage must be tendered, to entitle the person seeking the injunction to the consideration of the court.[3]

1807. When the mortgage was void in its inception on account of fraud, undoubtedly a sale under the power may be enjoined. The bill in such case must clearly disclose the fraud and the proof clearly substantiate it. Where a mortgage by a corporation was of doubtful validity on account of being made to the directors themselves on their own vote, a sale was restrained until a hearing of the case.[4]

But the application must be made by the mortgagor upon whom the fraud was practised in obtaining the mortgage, and cannot be made by a purchaser from the mortgagor without paying the entire debt, although the holder of the mortgage had taken it as security for a less amount,[5] or although he had taken it with notice of the fraud.[6]

There may also be an injunction against the execution of the power by reason of circumstances arising after the making of the mortgage, in consequence of which the execution of it would be inequitable; but the court will not interfere in such cases except upon strong reasons.[7] The fact that part of the principal of the debt has been paid does not warrant an injunction against the sale, unless it be in restraint of selling more than enough to pay the amount due.[8] But payment of the entire debt affords ground for such injunction.[9]

[1] Kershaw *v.* Kalow, 1 Cur. N. S. 974.

[2] Pender *v.* Pittman, 84 N. C. 372.

[3] Sloan *v.* Coolbaugh, 10 Iowa, 31; Powell *v.* Hopkins, 38 Md. 1; Vechte *v.* Brownell, 8 Paige (N. Y.), 212; Meysenburg *v.* Schlieper, 46 Mo. 209.

[4] Southampton Boat Co. *v.* Muntz, 12 W. R. 330.

[5] Foster *v.* Wightman, 123 Mass. 100.

[6] Fairfield *v.* McArthur, 15 Gray (Mass.), 526; and see § 1303.

[7] Per Greene, C. J., in Frieze *v.* Chapin, 2 R. I. 429, 432.

[8] Powell *v.* Hopkins, *supra.*

[9] Green *v.* Englemann, 39 Mich. 460.

A sale under a trust deed given for purchase money of land bought at a sale under a deed of trust executed by a third person will not be enjoined, so long as the petitioner claims title under such purchase, on the ground that the trustee under the former deed of trust had no power to make the sale, or that the deed of trust which is sought to be enforced is void because of an insufficient description of the land, when such description is the same as that contained in the deed under which he claims title.[1]

1808. Usury. — It is no ground for enjoining a sale under a trust deed that the notes secured reserve usurious interest or include it, except in those states where usury renders the contract void. The trustee's duty to sell and to apply the proceeds in discharge of the debt legally due remains the same. If he should attempt to misapply the proceeds, and pay on account of usury what was not legally due, the court would then interfere.[2] Where usury does not invalidate the mortgage, a sale under the power will not be enjoined by reason of it unless the debtor brings into court the principal and the legal interest due.[3] In New York, however, where usury renders void the contract, a power of sale in a usurious mortgage is considered void, and a sale under it may be restrained.[4] If a sale be actually made to one having no notice of the usury, it will be upheld;[5] but one having such notice would not by such sale acquire any title.[6] Neither is it a ground for enjoining a sale under a power that the mortgagee in his notice claims a greater amount than was actually and legally due.[7]

In North Carolina it is declared that a mortgagee will be enjoined from selling when there is any suggestion of oppression

[1] McCarley *v.* Tippah County, 58 Miss. 483.

[2] Tooke *v.* Newman, 75 Ill. 215.

[3] Powell *v.* Hopkins, 38 Md. 1; Walker *v.* Cockey, 38 Md. 75; Eslava *v.* Crampton, 61 Ala. 507.

In **Iowa** it seems that an injunction would be allowed in such case upon tender of the amount due, less the usurious interest. Casady *v.* Bosler, 11 Iowa, 242; and so in **Maryland**: Walker *v.* Cockey, *supra;* Gantt *v.* Grindall, 49 Md. 310. So in **Wisconsin**, without a tender. Haggerson *v.* Phillips, 37 Wis. 364.

[4] Hyland *v.* Stafford, 10 Barb. (N. Y.) 558; Burnet *v.* Dennison, 5 Johns. (N. Y.) Ch. 35, 41.

[5] Jackson *v.* Henry, 10 Johns. (N. Y.) 185.

[6] Jackson *v.* Dominick, 14 Johns. (N. Y.) 435.

[7] Armstrong *v.* Sanford, 7 Minn. 49. The rule is different in **Iowa**, where apparently an injunction would be granted upon a tender of the amount justly due. Stringham *v.* Brown, 7 Iowa, 33; Sloan *v.* Coolbaugh, 10 Iowa, 31.

arising from usury or the like;[1] but if the mortgagee waives the usurious part of the contract, the injunction will be refused.[2]

1809. Unconscionable penalty. — It has been said, however, that where a mortgage and note provide a penalty of a high rate of interest after maturity, such in amount that a court in equity would give relief against it as unconscionable, that the proper course is to obtain an injunction restraining a sale under the power until the amount actually due can be ascertained; because, if a sale is allowed to be had under the power, the mortgagee may retain the full amount of the debt and penalty, and the mortgagor cannot recover back any part of it by action at law. The contract is not in itself illegal, and the only relief against it is upon equitable considerations.[3]

1810. A want of notice of the sale is no ground for enjoining it. The power of sale generally stipulates that it shall be exercised only after giving notice by advertisement for a certain time in some newspaper, or after giving some other prescribed notice. In several states the notice to be given is prescribed by statute, and in such case the statute must be followed, whatever may be the provisions of the power in this respect. In either case a sale made without the proper prescribed notice is invalid, but ordinarily the courts will not interfere to restrain a sale about to be made without such notice. The purchaser is bound to know what the requirements of the deed or of the statute are in this respect, and to see that they have been complied with;[4] and the mortgagor and others interested in the equity may redeem all the same if the power is illegally exercised. Even under the English statute, which provides that the purchaser shall not be affected by the absence of such notice, and that the mortgagor may have remedy by an action for damages, or under a power with like provisions, the Court of Chancery has no jurisdiction to restrain a sale of which no notice has been given.[5]

1811. Not enjoined to allow set-off. — Neither will a sale under a power be enjoined, in order that the mortgagor may be

[1] Kornegay *v.* Spicer, 76 N. C. 95.

[2] Manning *v.* Elliott, 92 N. C. 48.

[3] Bidwell *v.* Whitney, 4 Minn. 76; Culbertson *v.* Lennon, 4 Minn. 51; Banker *v.* Brent, 4 Minn. 521.

[4] Anon. Madd. & Gel. 10. A provision in the power, that the purchaser shall not be bound to inquire into the existence of notice, does not protect him against his actual knowledge that there was no notice. Parkinson *v.* Hanbury, 1 Drew. & Sm. 143; *S. C.* 2 De G., J. & S. 450. See, also, Ford *v.* Heely, 3 Jur. N. S. 1116; Forster *v.* Hoggart, 15 Q. B. 155.

[5] Prichard *v.* Wilson, 10 Jur. N. S. 330.

enabled to set off a balance which may be found in his favor upon unliquidated claims in controversy between him and the mortgagee;[1] nor to enable the mortgagor to prosecute a bill to correct an alleged error in the amount of the mortgage.[2]

1812. Time for contribution to redeem. — It is no ground for suspending a sale that the several owners of the equity of redemption are at variance as to the proportions which they shall contribute for the redemption of the mortgage; though the court may, upon payment into court of a sum sufficient to indemnify the mortgagee against loss, grant a reasonable postponement.[3]

1813. When amount of debt is in dispute. — In an early case in New York a sale was enjoined on an application in behalf of an infant heir of the mortgagor, the amount due upon the mortgage being in dispute.[4] The court, however, did not seem to consider that the case afforded any equitable ground for interference, further than to subject the sale to some restrictions; and perhaps made these restrictions only because the defendant consented to them. These were, that the amount due should be computed by a master, who should be associated with the mortgagee in making the sale; and that a further notice of the sale should be given, and that only so much of the land should be sold as the master should deem sufficient, in case a part could be sold without prejudice. In another case in that state a sale was enjoined when the mortgagee claimed in his notice a larger amount than was actually due.[5] Whether these would be grounds for enjoining a sale, where there is no statute providing that only so much of the property shall be sold as is sufficient to satisfy the debt, may well be doubted. When the accounts between the parties are complicated, and the balance due under the mortgage is uncertain, a sale may sometimes be enjoined, until the equities between the parties, which should affect the amount due under the mortgage, are settled, and the balance due can be ascertained.[6]

[1] Frieze *v.* Chapin, 2 R. I. 429; and see Robertson *v.* Hogsheads, 3 Leigh (Va.), 667; Koger *v.* Kane, 5 Ib. 606; Gregg *v.* Hight, 6 Mo. App. 579.

[2] Outtrin *v.* Graves, 1 Barb. (N. Y.) Ch. 49.

[3] Brinckerhoff *v.* Lansing, 4 Johns. (N. Y.) Ch. 65.

[4] Van Bergen *v.* Demarest, 4 Johns. (N. Y.) Ch. 37. See § 1775.

[5] Cole *v.* Savage, Clarke (N. Y.), 361.

[6] Draper *v.* Davis, 104 U. S. 347; Kornegay *v.* Spicer, 76 N. Y. 95; Capehart *v.* Biggs, 77 N. C. 261; Purnell *v.* Vaughan, 77 N. C. 268; Bridges *v.* Morris, 90 N. C. 32; Rossett *v.* Fisher, 11 Gratt. (Va.) 492; Curry *v.* Hill, 18 W. Va. 370; Lallance *v.* Fisher (W. Va.), 2 S. E. Rep. 775; Muller *v.* Stone (Va.), 6 S. E. Rep. 223; Shultz *v.* Hansbrough, 33 Gratt. (Va.) 567. See Osburn *v.* Andre, 58 Miss. 609; Dickerson *v.* Hayes, 26 Minn. 100.

1814. Where one purchased land subject to a mortgage which he supposed was in the common form, without a power of sale, and would require three years' possession by the mortgagee to effect a foreclosure, the mortgage having been made the same day and not recorded, a sale under the power was enjoined upon his application. He was allowed, however, only time to raise the money, and not the three years in which to redeem.[1] It is conceived that in those parts of the country in which power of sale mortgages are now the usual and common form an injunction would not now be granted on like grounds.

1815. Clouding title. — The fact that the sale if made would, in the apprehension of the petitioner, result in clouding his title, is not such a threatened injury that an injunction should be granted to restrain it.[2] If the mortgagee should attempt to sell property not included in the mortgage, or an interest greater than the mortgage conveyed to him, the sale would be of no effect as regards such property or interest, and would not really cloud the title to it.[3]

1816. The insolvency of the trustee in a deed of trust is no ground for restraining a sale of the property upon the application of the grantor, unless it is shown that there is danger that the trustee will misapply the moneys arising from the sale.[4] But upon the application of one who is interested in the disbursement of the money, and the showing of sufficient cause, a court of equity should require security of the trustee before allowing him to proceed with the execution of the trust.[5]

1817. Scarcity of money or business depression. — The fact that at the time of the proposed sale under a mortgage or trust deed money is scarce, and that the terms of sale require a large cash payment, is no ground for an injunction;[6] nor is the fact that there is a general depression in business, and the weather inclement at the season of the year of the proposed sale.[7]

[1] Platt *v.* McClure, 3 Wood. & M. 151.

[2] Armstrong *v.* Sanford, 7 Minn. 49, per Atwater, J.; Montgomery *v.* McEwen, 9 Minn. 103; but see Hubbard *v.* Jasinski, 46 Ill. 160.

[3] Armstrong *v.* Sanford, *supra;* Preiss *v.* Campbell, 59 Ala. 635.

[4] Tooke *v.* Newman, 75 Ill. 215. Walker, C. J.: "Insolvency, or the want of large capital, by no means implies a want of integrity or business capacity. He may have these in the highest degree, and yet be poor."

[5] Terry *v.* Fitzgerald, 32 Gratt. (Va.) 843.

For a bond required of a complainant in such a case and the rights under such bond, see Foster *v.* Goodrich, 127 Mass. 176.

[6] Muller *v.* Bayly, 21 Gratt. (Va.) 521; Muller *v.* Stone (Va.), 6 S. E. Rep. 223.

[7] Caperton *v.* Landcraft, 3 W. Va. 540.

1818. A referee or master may be associated with the mortgagee for the purpose of insuring a fair sale, or a sale of only enough of the premises to satisfy the mortgage debt; instead of enjoining a sale, where there is apprehension of an oppressive or improper exercise of it.[1]

1819. Recovery back of money paid under duress. — Besides these remedies, by restraining or setting aside a sale improperly exercised, in case a mortgagor is obliged to pay a sum not properly chargeable to him, in order to prevent the sale of his property under the power, he may recover back the money so paid in a suit at law; as, for instance, where a mortgagee would not stop a sale unless the mortgagor would pay an extortionate sum for expenses then incurred in the proceedings to sell, and the mortgagor paid the amount under protest.[2]

1820. Mortgagee's damages and costs when wrongfully enjoined. — When wrongfully enjoined the mortgagee is not only entitled to the usual taxable costs and counsel fees, but also, when the sale does not yield enough to satisfy the debt, to interest on it while the collection of it was suspended, and to the value of the emblements removed by the owner in the mean time.[3]

Where the owner of the equity of redemption, upon the granting of a temporary injunction in his favor against a sale under a power contained in a second mortgage, was required to execute a bond to the mortgagee conditioned that, in case it should be determined that the mortgagee was entitled to hold the premises chargeable for the payment of his mortgage in full, the obligor should pay the overdue interest thereon, with interest on that sum, and "keep down all interest accruing or accrued" on the first mortgage; and subsequently the injunction was dissolved, the bill dismissed, and the premises sold under the power for a sum sufficient to pay the first, but not the second, mortgage in full, — it was held that the mortgagee was entitled to recover in a suit upon the bond, the interest on the second mortgage having been paid, the interest accrued on the first mortgage at the time the injunction issued, as well as the interest accruing thereon

[1] Van Bergen *v.* Demarest, 4 Johns. (N. Y.) Ch. 37.

[2] Close *v.* Phipps, 7 Man. & G. 586. Tindal, C. J.: "The money was obtained by what the law would call *duress;* as the plaintiff was obliged either to pay it or to suffer her estate to be sold, and incur the expense and risk of a bill in equity." And see Vechte *v.* Brownell, 8 Paige (N. Y.) 212.

[3] Aldrich *v.* Reynolds, 1 Barb. (N. Y.) Ch. 613.

from that time to the dissolution of the injunction,[1] but not afterwards.[2] The obvious purpose of the clause providing that the owner of the equity of redemption should pay the accrued interest on the first mortgage was, that while the second mortgagee was restrained from selling, the holder of the first mortgage should be paid the interest due upon that mortgage, so that he would not foreclose and thereby cut off the second mortgagee.[3]

VI. *Personal Notice of Sale.*

1821. No notice at all is necessary unless made so by statute, or by the power itself;[4] the sale may be private.[5] When that provides only for a published notice, this is all that any one interested in the property is entitled to, unless there be an agreement for an express notice.[6] In no case is an actual personal notice of the sale to the mortgagor necessary unless this is provided for in the mortgage, or has been promised in some other way,[7] or is due to the mortgagor in fairness because he might be thrown off his guard by prior acts or proceedings of the mortgagee.[8] When the power authorizes a sale either by public auction or private contract, the mortgagee may sell by private contract without making a previous attempt to sell by auction.[9]

A mortgagee is not bound to adopt any other mode of adver-

[1] Goodrich *v.* Foster, 131 Mass. 217.

[2] Foster *v.* Goodrich, 127 Mass. 176.

[3] Goodrich *v.* Foster, *supra*, per Endicott, J.

[4] Davey *v.* Durrant, 1 De G. & J. 553. The power in this case authorized a sale either by public sale or private contract. Marston *v.* Brittenham, 76 Ill. 611. See, also, Hoodless *v.* Reid, 112 Ill. 105.

[5] Mowry *v.* Sanborn, 68 N. Y. 153, 160, per Andrews, J.; Martin *v.* Paxson, 66 Mo. 260, 266, per Hough, J.

[6] Dyer *v.* Shurtleff, 112 Mass. 165; Hurt *v.* Kelly, 43 Mo. 238; Manning *v.* Elliott, 92 N. C. 48; Bridges *v.* Morris, 90 N. C. 32.

[7] Princeton Loan & Trust Co. *v.* Munson, 60 Ill. 371. "The debtor himself here prescribed the kind of notice which should be given in case of sale: it was not personal notice, but notice by advertisement in a newspaper. To say that a further personal notice was required by implication would be to annex a condition to the power of sale which the maker of the power did not see fit to provide, and the court would be making a contract for the parties instead of enforcing the one made by themselves." Per Mr. Justice Sheldon. See, also, Cleaver *v.* Green, 107 Ill. 67.

In Capehart *v.* Biggs, 77 N. C. 261, Pearson, C. J., says that the mortgagee before selling ought to give the mortgagor reasonable notice that in default of payment he will sell, and that the want of such notice is ground for enjoining the sale. But this decision is all wrong. It takes the parties under guardianship; and more, it makes a contract for them. This case has since been overruled on this point. Manning *v.* Elliot, *supra;* Bridges *v.* Morris, *supra.* See, also, Hoodless *v.* Reid, *supra;* Marston *v.* Brittenham, *supra.*

[8] Tartt *v.* Clayton, 109 Ill. 579; Webber *v.* Curtis, 104 Ill. 309.

[9] Davey *v.* Durrant, *supra.*

tisement and sale than that specified in the mortgage; even to recover upon an agreement by a third person that, if the mortgagee is obliged to sell the mortgaged premises for breach of condition, and shall advertise and sell the same, such third person will purchase the premises and pay the amount of the mortgage.[1]

1822. All the essential requisites of the power must be strictly complied with;[2] and when there are statutory provisions relating to the notice of the sale, or the conduct of it, these must be strictly followed. These requirements of the power and of the statute are conditions on which the foreclosure depends, and if not fulfilled the sale is void.[3]

Under a statute or power requiring the service of notice upon the mortgagor and others interested in the equity of redemption, a sale without such notice does not bar the right of redemption of a person entitled to it, even though he had actual notice of the sale. He is entitled to the legal notice.[4]

1823. When the notice required is a personal notice to the mortgagor or his assigns, if fairly given pursuant to the power, it does not matter that the person upon whom it is served is an infant, or is insane, or under any other disability.[5]

1824. A mortgagor cannot waive notice for others. If those claiming under the mortgagor are entitled to notice, he cannot waive it as against them and consent to a sale.[6] But he may waive it for himself.[7]

1825. If a mortgagee voluntarily promises the mortgagor not to sell under the power without notice to him, there being no consideration for the promise, it is not legally binding upon him, and he may sell under the power, or assign the mortgage to others who may sell without giving notice, and such assignees are not liable to action for depriving the mortgagor of his equity of redemption, even if they obtained the assignment by fraud and falsehood.[8] The promise of the mortgagee would not bind his

[1] Stickney *v.* Evans, 127 Mass. 202.

[2] Ormsby *v.* Tarascon, 3 Litt. (Ky.) 404; Dana *v.* Farrington, 4 Minn. 433; Gibson *v.* Jones, 5 Leigh (Va.), 370.

[3] New York: Low *v.* Purdy, 2 Lans. 422; Cole *v.* Moffitt, 20 Barb. 18; Cohoes Co. *v.* Goss, 13 Barb. 137; King *v.* Duntz, 11 Barb. 191; St. John *v.* Bumpstead, 17 Barb. 100; Van Slyke *v.* Shelden, 9 Barb. 278.

[4] Root *v.* Wheeler, 12 Abb. (N. Y.) Pr. 294.

[5] Tracey *v.* Lawrence, 2 Drew. 403; Robertson *v.* Lockie, 15 Sim. 285.

[6] Forster *v.* Hoggart, 15 Q. B. 155.

[7] Maulsby *v.* Barker, 3 Mack (D. C.), 165.

[8] Randall *v.* Hazelton, 12 Allen (Mass.), 412.

assignee who had no knowledge of it. But a sale by the person who made such promise, without giving the promised notice, would be set aside unless a *bonâ fide* purchaser had acquired title by receiving a deed before any proceedings to set the sale aside were begun.[1] But the sale will not be set aside on the ground of such a promise when the evidence as to the promise is conflicting, and the conduct of the debtor after the sale has been inconsistent with his reliance upon such a promise.[2] If a mortgagee has promised a junior mortgagee or any one claiming under the mortgagor that he will notify him if he should wish to enforce the mortgage, or that he will give him an account of his claim, his entry and foreclosure without such special notice is fraudulent, and the right to redeem remains open to such party until the stipulated notice is given or account rendered, the property remaining in the hands of the mortgagee who promised to give such notice.[3]

1826. Neglect to give notice may be ground for setting aside a sale. Where the owner of the equity of redemption gave money to the mortgagor to pay an instalment of interest, but the mortgagor did not pay it over to the mortgagee, and the owner being informed that the mortgagor had not paid the interest sent word to the mortgagee's attorney that if the mortgagor did not pay the interest he would, and the mortgagee afterwards, without giving notice to the owner, sold the estate; although the mortgagee acted in good faith and in exact conformity to the provisions of the mortgage, and sold the estate to a purchaser who in good faith was the highest bidder at the sale, no deed having been delivered, the sale was set aside in equity on the ground that after it became evident that the mortgagor would not pay, notice should have been given to the owner.[4]

VII. *Publication of Notice.*

1827. The notice usually required in powers of sale is a publication for a certain length of time in one or more newspapers published in the county in which the premises are situate. As will be seen by reference to the statutes relating to power of sale mortgages, the substance of the notice and the manner of giving it are prescribed in several states; and where this is the case the

[1] Pestel *v.* Primm, 109 Ill. 353.

[2] Hairston *v.* Ward, 108 Ill. 87.

[3] Hall *v.* Cushman, 14 N. H. 171; Green *v.* Cross, 45 N. H. 574; Rutherford *v.* Williams, 42 Mo. 18; Clarkson *v.* Creely, 40 Mo. 114; *S. C.* 35 Mo. 95.

[4] Drinan *v.* Nichols, 115 Mass. 353.

requirements of the statute must be strictly followed, whatever may be the terms of the power.[1] The power may impose additional obligations, but cannot take away any of those imposed by statute; as, for instance, a private sale, though expressly authorized by the mortgage, would not bar the equity of redemption when a sale at public auction, after giving specified notices, is required by statute.[2] It has been held that a foreclosure according to the statutory requirement is valid, even when the power imposes additional requirements.[3] In the absence of statutory requirements, the kind of notice, the place where it shall be given, the time when it shall be given, and the duration or number of publications, are properly subjects of contract between the parties, and their agreement is binding upon them.[4] The parties may agree that the notice shall be published in a county or state other than that in which the land is situated; or they may agree to dispense with notice altogether.

1828. Statutes regulating the foreclosure of mortgages have no application to mortgages of real estate situated out of the state where the statute was enacted.[5] The court cannot in such case interfere with or control a sale made within the state, according to such terms as the parties have agreed upon in the power, unless it appears that these terms are contrary to the statutes or law of the state or country where the land is situated, or that there is some illegality in the proceedings to sell. The parties to a mortgage have the power, in the absence of any statute regulation, to agree upon the manner in which the property may be sold to realize the security. Therefore a sale after specified notices in the city of New York, of lands situate in Colorado, authorized by mortgage, cannot be restrained by the courts of New York as being in conflict with the statutes of that state. The only ground of interference would be that the sale provided for was in conflict with the laws of Colorado.[6]

[1] Shillaber *v.* Robinson, 97 U. S. 68.

[2] Lawrence *v.* Farmers' Loan & Trust Co. 13 N. Y. 642. A doubt has been expressed whether this decision should be extended to any requirement other than a sale at public auction; whether a compliance with the statute in any other respect is necessary; as, for instance, whether compliance with a provision in a power that the notice of sale shall be for a shorter time, and in a different manner, from that required by statute, would not be sufficient. Elliott *v.* Wood, 53 Barb. 285, 305; *S. C.* 45 N. Y. 71. And see Webb *v.* Haeffer, 53 Md. 187.

[3] Butterfield *v.* Farnham, 19 Minn. 85.

[4] Martin *v.* Paxson, 66 Mo. 260.

[5] Elliott *v.* Wood, 45 N. Y. 71; Central Gold Mining Co. *v.* Platt, 3 Daly (N. Y.), 263.

[6] Carpenter *v.* Black Hawk Gold Mining Co. 65 N. Y. 43.

1829. Fairness required. — In giving the notice the mortgagee is required to act in a business-like manner, with a view to obtain as large a price as he reasonably can with due diligence on his part, and in common fairness towards the mortgagor.[1] So far as the deed leaves any matters pertaining to the exercise of the power to the discretion of the mortgagee or trustee, a fair and honest exercise of his judgment is demanded.[2]

The provisions of the power and of any statute regulating the exercise of it must be strictly complied with;[3] but at the same time such strictness and literal compliance should not be exacted as would destroy the power and render the intended security valueless.[4] The proceedings may be regarded as *ex parte*, and the mortgagor may be divested of his estate without his knowledge and without his consent other than that contained in the mortgage itself. But under a statute providing for a certain notice of sale in case the parties fail to provide for a notice in the deed, it has been held that the notice prescribed by statute may be used in case the mode of notice agreed upon in the mortgage is impossible; as where this required an advertisement every other day in some newspaper published in the county, when there was no paper other than two weekly papers published in the county.[5]

1830. Burden of proof as to notice. — When the validity of a sale under a power is questioned, on the ground that the advertisement of the sale was not made in pursuance of the deed, the better opinion is that in an action at law it will be presumed, after the execution of a deed under the power of sale to the purchaser, that all the terms of the power and all requirements as to notice have been complied with. Certainly in an action of ejectment by the purchaser against the grantor or other person in possession, no evidence aside from the deed to such purchaser and the recitals in it is necessary to show title and right of possession in the plaintiff.[6] It would seem, moreover, that the defendant would not be permitted to prove that notice of sale was not given under the power,

[1] Matthie *v.* Edwards, 2 Coll. 465; Hoffman *v.* Anthony, 6 R. I. 282; Meacham *v.* Steele, 93 Ill. 135.

[2] Ingle *v.* Culbertson, 43 Iowa, 265.

[3] Lee *v.* Mason, 10 Mich. 403; Hebert *v.* Bulte, 42 Mich. 489; Doyle *v.* Howard, 16 Mich. 261; Sherwood *v.* Reade, 7 Hill (N. Y.), 431; Thompson *v.* Commissioners, 79 N. Y. 54; Wood *v.* Lake, 62 Ala. 489.

[4] Waller *v.* Arnold, 71 Ill. 350.

[5] Warehime *v.* Carroll Co. Build. Asso. 44 Md. 512.

[6] Savings and Loan Soc. *v.* Deering, 66 Cal. 281; and see White *v.* Stephens, 77 Mo. 452; Dryden *v.* Stephens, 19 W. Va. 1; Lallance *v.* Fisher (Wa. Va.), 2 S. E. Rep. 775.

because the deed would confer upon the purchaser the legal title to the land.[1] Yet it has been held, in a few cases in equity, that the burden of proving a proper advertisement rests upon the purchaser or other party insisting upon the sale,[2] and that recitals in a deed made by the person clothed with the power in execution of it is no evidence of compliance with the prerequisites to a valid sale.[3]

Even on a bill to set aside a sale on the ground that the notice of sale was defective, and was published in an obscure paper, the burden of proving these defects rests with the complainant.[4] It will be presumed that the terms and conditions of the deed of trust or mortgage were complied with and notice of sale properly given; though this presumption arising from the deed under the power and the recording of it may be rebutted in equity by proof to the contrary.[5]

1831. A notice of sale published before any default has occurred in the condition of the mortgage is ineffectual and void, and a sale under it would be invalid.[6] Equally ineffectual would be a publication after the time fixed for the sale. For these reasons it has been necessary to determine in some cases when a publication takes place. The time of publication and the date of the paper are not always or necessarily the same; and in the case of newspapers published weekly, it is the general practice to issue a portion, at least, of the copies printed in advance of the date of the paper. In case of a newspaper dated Saturday, the whole edition of which, except a small fraction, is either delivered by carriers to subscribers, or deposited in the post-office on Friday, the publication is undoubtedly on Friday. When the proprietor of the paper sends the copies out or mails them, they pass beyond his control and the publication is complete. The fact that a small portion of the edition is not issued till Saturday is not material. It is not necessary that a notice should appear in every copy of the whole edition regularly printed and published in order to constitute a publication. In such case, therefore, if Friday be the last day for payment, the debtor would have the whole of the business hours of that day in which to make payment, and the publication would be in advance of the default, and would be

[1] Fulton *v.* Johnson, 24 W. Va. 95, 108, per Green, J.; Windett, *v.* Hurlbut, 115 Ill. 403. See § **1895**.

[2] Gibson *v.* Jones, 5 Leigh (Va), 370; Wood *v.* Lake, 62 Ala. 489.

[3] Wood *v.* Lake, *supra*.

[4] Tartt *v.* Clayton, 109 Ill, 579.

[5] Burke *v.* Adair, 23 W. Va. 139.

[6] Gustav. Adolph. Build. Asso. *v.* Kratz, 55 Md. 394; Potomac Manuf. Co. *v.* Evans (Va.), 6 S. E. Rep. 2; Long *v.* Long, 79 Mo. 644.

ineffectual as the first publication of the notice.[1] If such a publication before default is one of the requisite number of publications prior to the time appointed for the sale, a subsequent postponement of the day of sale for a week does not cure the defect, even if the notice be again published, because neither the notice fixed for the day of sale in the first place, nor that for the adjourned day, is published for the requisite number of weeks before the sale.[2]

1832. An assignment of the mortgage after the first advertisement of the sale, and before the day of sale, invalidates the sale if the assignee continues the advertisement and sells under it, instead of advertising anew in his own name.[3] This is upon the ground that by the assignment the mortgagee ceased to have any interest in the mortgage; and that the power cannot be separated from the interest in the land, and exercised by one having no interest whatever in the mortgage. The assignment, moreover, vests the legal interest of the mortgage in the assignee, and the power necessarily passes with it unless expressly reserved. "An advertisement in the name of the mortgagee in this case can have no greater force or effect than if it had been made in the name of a third person, a stranger to all the parties in interest, which would be none at all."[4]

1833. Change of statute as to length of notice. — It is within the power of a legislature to change an existing law which requires the notice under a power of sale to be published for a certain length of time before the sale, by providing for a shorter time of publication, and such a law is not unconstitutional as applied to mortgages existing at the time of its passage.[5] It does not impair the obligation of the contract. It operates upon the remedy only, and it does not in such operation impair or take away the right of the mortgagee to enforce the obligation. The time of notice might be lengthened, and the remedy rendered less speedy and convenient, without impairing the obligation. If there is still a substantial obligation left, that is sufficient.

1834. How long after publication sale may be. — In the absence of any express provision in regard to the time at which a sale shall be made after the publication of the notice, the sale must be within such a reasonable time after the last publication as not to thwart the purpose of the statute; but it need not be

[1] Pratt *v.* Tinkcom, 21 Minn. 142.
[2] Pratt *v.* Tinkcom, *supra.*
[3] Niles *v.* Ransford, 1 Mich. 338.
[4] Ibid., per Wing, J.
[5] James *v.* Stull, 9 Barb. (N. Y.) 482.

within the week following the last advertisement.[1] A provision that a sale may be made after a certain number of days' notice does not limit the sale to the day immediately succeeding the expiration of the time named.[2] A sale made without advertising it for the time required by the deed is void.[3]

1835. Selection of newspaper. — The deed of trust or mortgage usually provides for the publication of notice of the sale in some newspaper published in the county or place where the property is situated. No particular newspaper being designated, the trustee or mortgagee may select any suitable medium for the publication at his discretion, observing the general requirement of the trust that he act in fairness and in good faith.[4] It is not requisite that he should select the paper of the largest circulation, or of any particular class or character. A publication in a law and advertising journal of limited circulation has been held to be proper.[5] A paper issued weekly, and principally devoted to matters of interest to a particular religious denomination, but containing a column devoted to general news, is a "newspaper" in which a notice of sale may be published.[6] No proof of the notoriety or extent of the circulation of the paper in which the notice was published is required to sustain a sale under it.[7]

If the deed does not prescribe the place of publication, but leaves this to the discretion of the trustee, he may, in a fair exercise of his discretion, publish notice in a newspaper printed outside the limits of the state in which the land is situated.[8]

Under a statute which requires the publication of the notice in a newspaper "printed" in the county, evidence that the notice was published in a newspaper "published" in the county does not show a compliance with the statute.[9]

1836. Publication in two counties. — Where the deed provided that notice of sale should be given "by advertisement in some newspaper printed in St. Louis and Franklin County," and notice was given only in a newspaper printed in the latter county, the sale was declared void. The deed being recorded, the pur-

[1] Atkinson *v.* Duffy, 16 Minn. 45.

[2] Beal *v.* Blair, 33 Iowa, 318.

[3] Sumers *v.* Schrader, 88 Mo. 20.

[4] Ingle *v.* Culbertson, 43 Iowa, 265; Thompson *v.* Heywood, 129 Mass. 401.

[5] Kellogg *v.* Carrico, 47 Mo. 157; Benkendorf *v.* Vincenz, 52 Mo. 441; Taylor *v.* Reid, 103 Ill. 349.

[6] Hull *v.* King (Minn.), 37 N. W. Rep. 792; Beecher *v.* Stephens, 25 Minn. 146; Kerr *v.* Hitt, 75 Ill. 51; Hernandez *v.* Drake, 81 Ill. 34.

[7] St. Joseph Manufacturing Co. *v.* Daggett, 88 Ill. 556.

[8] Ingle *v.* Jones, 43 Iowa, 286.

[9] Bragdon *v.* Hatch, 77 Me. 433.

chaser had notice of its requirements, and was bound by them.[1] A requirement in a deed of trust that sixty days' notice shall be given in newspapers published in Richmond, Virginia, and in the city of New York, must be fully complied with to effect a valid sale; and the fact that the mortgagee was in Virginia where the land was situated, and communication with New York was prohibited on account of the pending war, is no excuse for failure to publish the notice as required.[2]

1837. Posting in public places. — A deed of trust required notice of sale to be posted in four public places in the county, and two of the notices were posted at different places in the same town. Objection was taken that the town was but one public place; but the court, without admitting that there was anything in the objection, held that it could only be availed of in equity, and not in an action at law.[3] Under a deed which provides for a sale on thirty days' notice by posting, if the notices have been put up that number of days before the sale, it is not necessary to the validity of the sale that the notices shall remain posted all the time up to the sale.[4]

A provision in a mortgage that the mortgagee might sell after having advertised the sale for sixty days in a newspaper published in a town named, "by posting up written or printed notices in four places in the county," was construed to mean that the notice might be given in either mode, the word *by* being evidently a mistake for *or*.[5]

1838. Length of time of publication. — A deed of trust required a publication of the notice of sale for five consecutive days, the last of which should be ten days before the sale. The last notice was on the eleventh day before that fixed for the sale. Upon a claim that the last insertion should have been on the tenth day before the sale, it was held that the last insertion might be more than ten days before the sale, but could not be made within a less time.[6] A longer notice, within a reasonable limit, does not injure but rather benefits the debtor.

A requirement in a deed of "thirty days' public" notice in a newspaper is satisfied by the publication of notice on each suc-

[1] Thornburg *v.* Jones, 36 Mo. 514.

[2] Bigler *v.* Waller, 14 Wall. 297.

[3] Rice *v.* Brown, 77 Ill. 549. In Graham *v.* Fitts, 53 Miss. 307, it was held that there was nothing in a kindred objection.

[4] Graham *v.* Fitts, *supra*..

[5] Watson *v.* Sherman, 84 Ill. 263.

[6] Tooke *v.* Newman, 75 Ill. 215; Taylor *v.* Reid, 103 Ill. 349; Beal *v.* Blair, 33 Iowa, 318.

cessive secular day in a newspaper not published on Sundays.[1] A requirement of publication "ten days before the sale" is fulfilled by publishing a notice of a sale to be had on the thirteenth day of a month, on the second day of that month, and each day thereafter except Sunday, although there are only nine insertions of the notice.[2] It is a sufficient compliance with a requirement that ten days' notice of the sale shall be given, that the first insertion of the notice is made not less than ten days before the sale. It is not necessary that ten days shall intervene between the last insertion and the day of sale.[3] A requirement of "three weeks' previous notice" is met by a publication once a week for three weeks, and does not render necessary the publication of the notice daily for three weeks previous to the sale.[4] A sale authorized after "first giving thirty days' public notice" is properly advertised by the publication of a notice once a week for five weeks, the first publication being more than thirty days before the sale.[5] A requirement of notice in a newspaper "ten days before the day of sale" would be satisfied, it would seem, by a single publication ten days before the sale, — the language not importing a continuous publication.[6] So a requirement of notice "thirty days before the day of sale" is satisfied by a single publication that length of time before the sale.[7]

But on the other hand a provision for "twenty days' notice" of a sale has been held to mean a continuous publication for that time.[8] Whether the publication must be continuous is a question depending upon the meaning of the language used.

Where a power in a mortgage requires the notice of sale to be published "once each week for three successive weeks," the first publication need not be made three weeks before the time appointed for the sale.[9] The rule is the same where the power requires "thirty days' notice by publishing once a week for three

[1] Kellogg *v.* Carrico, 47 Mo. 157.

[2] Cushman *v.* Stone, 69 Ill. 516; Weld *v.* Rees, 48 Ill. 428; St. Joseph Manufacturing Co. *v.* Daggett, 84 Ill. 556.

[3] St. Joseph Manufacturing Co. *v.* Daggett, *supra.*

[4] Johnson *v.* Dorsey, 7 Gill (Md.), 269. *In re* Harris, 14 R. I. 637; Thurston *v.* Miller, 10 R. I. 358.

[5] Leffler *v.* Armstrong, 4 Iowa, 482; Enocks *v.* Miller, 60 Miss. 19; Taylor *v.* Reid, 103 Ill. 349.

[6] Weld *v.* Rees, 48 Ill. 428, 432. See, also, Muskingum Valley Turnpike Co. *v.* Ward, 13 Ohio, 120; Andrews *v.* Railroad Co. 14 Ind. 169.

[7] Jenkins *v.* Pierce, 98 Ill. 646.

[8] Washington *v.* Bassett (R. I.), 10 Atl. Rep. 625; Stine *v.* Wilkson, 10 Mo. 75, 96; Bank *v.* Stumpf, 73 Mo. 311; Leffler *v.* Armstrong, *supra.*

[9] Dexter *v.* Shepard, 117 Mass. 480; Frothingham *v.* March, 1 Mass. 247; Wilson *v.* Page, 76 Me. 279.

weeks successively."[1] And so in New York, where publication for twelve weeks successively, at least once a week, is required, the publications may be made in less than eighty-four days, provided there be a publication once in each week for twelve successive weeks.[2] It would seem that the last advertisement may be on the morning of the day of sale.[3]

But a requirement of publication "for twelve successive weeks, at least once in each week," is not met by a publication once in each week for twelve weeks, followed by a sale made less than twelve weeks from the time of the first publication.[4]

The notice need not be published in all the editions of the paper issued on the days on which the notice was published.[5]

The mortgagor or owner of the equity of redemption may agree that the advertisement may be for a shorter period than that expressed in the deed, and his agreement estops him from afterwards objecting that this provision of the power was not complied with.[6]

VIII. *What the Notice should contain.*

1839. The advertisement of the sale should fully comply with the terms of the power, and even a bare literal compliance is not enough. It must give with clearness all reasonable information about the proposed sale. It should appear upon the face of it that the sale is to be made by virtue of the power, or for the purpose of foreclosure.[7] It should show that a default has occurred within the terms of the mortgage;[8] but it need not point out for what particular breach of condition the sale is to be made.[9] If the advertisement of the sale is prescribed by statute, the provisions of the statute must be complied with; but if all the information required by the statute is fully given in the notice as published, the fact that it does not state in the words of the statute that the mortgage will be foreclosed by a sale of the mortgaged premises, is immaterial.[10]

[1] First Nat. Bank *v.* Bell S. & C. Min. Co. (Mont.) 19 Pac. Rep. 403.

[2] George *v.* Arthur, 2 Hun (N. Y.), 406; Howard *v.* Hatch, 29 Barb. (N. Y.) 297; and see, as to judicial sales, Wood *v.* Morehouse, 45 N. Y. 368, affirming 1 Lans. 405; Olcott *v.* Robinson, 21 N. Y. 150, reversing 20 Barb. 148; Enocks *v.* Miller, 60 Miss. 19.

[3] Worley *v.* Naylor, 6 Minn. 192. This decision was founded on a statute.

[4] Bacon *v.* Kennedy, 56 Mich. 329; Gantz *v.* Toles, 40 Mich. 725.

[5] Everson *v.* Johnson, 22 Hun (N. Y.), 115.

[6] Maulsby *v.* Barker, 3 Mack. (D. C.) 165.

[7] Leet *v.* McMaster, 51 Barb. (N. Y.) 236; Judd *v.* O'Brien, 21 N. Y. 186, 190.

[8] Bush *v.* Sherman, 80 Ill. 160.

[9] King *v.* Bronson, 122 Mass. 122

[10] Maxwell *v.* Newton, 65 Wis. 261; White *v.* McClellan, 62 Md. 347.

1840. It must properly describe the premises and the interest to be sold, so as to reasonably inform the public as to what is to be sold ;[1] and if the description, though including the lot to be sold, contains double the area of the lot mortgaged, the sale will be void.[2]

If the sale embraces the whole of the property mortgaged, the description should conform substantially to that contained in the mortgage. A notice which states nothing as to the quantity of land to be sold, and gives no metes or bounds and no information whether it is a village lot or a farm, is insufficient.[3] It is usual and proper, besides describing the premises by metes and bounds, to refer to the book and page of the record of the mortgage deed and to give the date of it. An advertisement following the description of the premises by metes and bounds contained in the mortgage, and referring by book and page to the registry of deeds, and by book and page to a plan recorded in the office of the superintendent of public lands, contains a sufficient description of the property,[4] though this description be imperfect ;[5] but if the premises are sufficiently described in other respects, an error in the reference to the record or to the date would not, it is conceived, invalidate the notice. Even where by statute these are required to be given, a notice referring correctly to the clerk's office where the mortgage is recorded, and to the date of the record, is held sufficient, although it mistakes the number of the book in which the record is made.[6]

A sale will not be set aside because the notice of sale fails to state in what town the property is situated, where the description is in other respects sufficient for its location and identity, and the notice is published in the town where the property is situated ; especially if there is no intimation that the property sold for less than its fair market value.[7]

A description of the property merely by reference to a plat or deed on record has been held sufficient ;[8] though it is probable

[1] Newman *v.* Jackson, 12 Wheat. 570 ; Reading *v.* Waterman, 46 Mich. 110; 8 N. W. Rep. 691 ; Stephenson *v.* January, 49 Mo. 465 ; Loveland *v.* Clark (Colo.), 18 Pac. Rep. 544.

[2] Fenner *v.* Tucker, 6 R. I. 551 ; Hoffman *v.* Anthony, 6 R. I. 282.

[3] Rathbone *v.* Clarke, 9 Abb. (N. Y.) Pr. 66, note.

[4] Stickney *v.* Evans, 127 Mass. 202.

[5] Robinson *v.* Amateur Asso. 14 S. C. 148; Loveland *v.* Clark (Colo.), 18 Pac. Rep. 544.

[6] Judd *v.* O'Brien, 21 N. Y. 186.

[7] Dickerson *v.* Small, 64 Md. 395. See Reeside *v.* Peter, 30 Md. 120.

[8] Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64.

that such a description would not generally be held good. The description should be sufficient to apprise the mortgagor and others interested in the land that the land to be sold is that in which they have an interest; and sufficient to enable those who may wish to purchase to locate and identify the property, though a description by metes and bounds is not always necessary.[1] When a portion of the land described in the mortgage has been released from the operation of it, it is desirable that the portion remaining which is to be sold should be described by metes and bounds, with a reference to the mortgage and to the date and record of the release, rather than that the premises should be described in the same manner as they are described in the mortgage with such reference to the release made. But a notice containing only a reference to the excepted portion released is good.[2] When, however, there have been many releases, so that the part to be sold would not be recognized at all by the description given in the mortgage, a description of the premises to be sold as they actually are is all the more desirable; and a reference to the releases, except generally, or as being the property not before released of record from the operation of the mortgage, is not important.

If the description of the premises follows that in the mortgage, this is generally sufficient;[3] and a change in the street number of the building since the mortgage was made does not invalidate the notice.[4]

1841. Notices of distinct lots should be separate. Several mortgages or deeds of trust having the same parties, and in every way alike except in the amounts secured, should be advertised separately, if they cover different lots of land.[5] But there is no legal objection to advertising the several parcels under the several mortgages or trust deeds in one notice, reciting each mortgage or deed, and the lands thereby conveyed.[6] The sales of the several

[1] Jackson *v.* Harris, 3 Cow. (N. Y.) 241.

[2] Wilson *v.* Page, 76 Me. 279.

[3] Loveland *v.* Clark (Colo.), 8 Pac. Rep. 544; Reading *v.* Waterman, 46 Mich. 110; 8 N. W. Rep. 691.

[4] Model Lodging House Asso. *v.* Boston, 114 Mass. 133.

[5] Morse *v.* Byam, 55 Mich. 594; Marsh *v.* Morton, 75 Ill. 621. In this case notices under nine trust deeds upon different lots were published separately, and occupied about three columns of a daily paper. It was objected that the notices should have been consolidated into one, but the court allowed costs for the separate notices.

[6] Tyler *v.* Mass. Mut. Ins. Co. 108 Ill. 58.

parcels should be made separately. If, however, the different mortgages are upon the same lot, there would seem to be no objection to publishing them together.

1842. Where the advertisement gave only a short and incomplete description of the property, and did not state the name of the mortgagee or of the assignee of the mortgage, and was signed only "per order of the assignee of said mortgage," and the place of sale was remote from the premises to be sold, and the notice was ineffectual to attract purchasers, the sale was held invalid, and the mortgagor allowed to redeem.[1] "With such a notice," say the court, "and under such circumstances, a mortgagee, who is authorized to sell only at auction, finding himself to be the only bidder at the sale, cannot in good faith proceed with the sale and purchase the property for himself at his own price, and insist upon such a purchase as precluding the mortgagor from all right to redeem the property."

1843. The notice must show who orders the sale; and if it omits to identify the holder of the mortgage, and is signed by no one, although it states the names of the mortgagor and mortgagee, and refers to the book and page of the record of the mortgage, a sale under it will be invalid.[2] In Rhode Island, however, it has been held that an advertisement is sufficient although the mortgagee was not named in the notice, and that was signed only in the words "by order of the mortgagee."[3] But the same court held a notice to be fatally defective in which the reference to the record was not correctly made, and neither the name of the mortgagor nor of the mortgagee nor of the auctioneer was given, and the notice was not signed by any one.[4] Under a statute requiring that the notice shall specify the name of the mortgagee, it is sufficient that the notice is signed by him and contains an accurate reference to the record.[5] Upon the death of the mortgagee, in the absence of any bequest of the mortgage, the legal title vests in his executor or administrator; and a notice signed by the executor or administrator, with the word "executor" or "administrator" affixed, sufficiently discloses his interest and the source of his title.[6]

In a notice of sale by a mortgagee it is not necessary to set

[1] Montague *v.* Dawes, 14 Allen (Mass.), 369.

[2] Roche *v.* Farnsworth, 106 Mass. 509.

[3] Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64; Woonsocket Inst. for Savings *v.* Am. Worsted Co. 13 R. I. 255.

[4] Hoffman *v.* Anthony, 6 R. I. 282.

[5] Candee *v.* Burke, 1 Hun (N. Y.), 546.

[6] Bridenbecker *v.* Prescott, 3 Hun (N. Y.), 419.

forth an assignment of the mortgage made by him, and a reassignment to him by the assignee.[1]

A notice which does not give correctly the name of the mortgagor, when a statute provides that the notice shall specify the names of the mortgagor and mortgagee, is insufficient, and a sale under it is invalid.[2] But a notice which in reciting the name of the mortgagee omits the initial of his middle name, but the notice at the end is properly signed by the mortgagee with his full name, is a valid notice, and affords no ground for setting aside a sale under it.[3]

1844. The notice of sale need not name the owners of the equity of redemption, or the subsequent mortgagees, or others who have acquired an interest in the estate from the mortgagor since the mortgagee's title accrued.[4]

1845. It must specify definitely the time and place of sale.[5] A notice of a sale advertised to take place in February, 1858, though the sale was intended to be made and was actually made in 1859, was fatally defective.[6] If there be an established usage that such sales shall be at a particular place, as, for instance, the rotunda of the city hall, a notice of a sale to be made at the city hall would be sufficient.[7] Under the Minnesota statute for sale by advertisement, a notice of sale appointed for the 7th day of November, 1859, without naming any hour of sale, does not necessarily render the sale invalid. It is an irregularity which is not allowed to overthrow a sale, unless seasonable application be made, and certainly not after a lapse of twelve years after the time of sale.[8] A sale advertised to be made at "the hour of eleven o'clock" may be made at any time between eleven and twelve o'clock of the day named. For the purposes of the sale, it is to be considered eleven o'clock until it is twelve o'clock.[9]

1846. If the power makes no provision as to the time,

[1] White *v.* McClellan, 62 Md. 347.

[2] Lee *v.* Clary, 38 Mich. 223; Thompson *v.* Commissioners, 79 N. Y. 54.

[3] White *v.* McClellan, *supra.*

[4] Learned *v.* Foster, 117 Mass. 365; Dyer *v.* Shurtleff, 112 Mass. 165. In Roche *v.* Farnsworth, 106 Mass. 509, the omission to name those who had acquired interest in the property from the mortgagor was alluded to as one of the defects of the notice, but the decision does not rest upon that; the fatal defect there being the omission to name, either in the body of the notice or in the signature, the assignee of the mortgage who made the sale.

[5] Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35.

[6] Fenner *v.* Tucker, 6 R. I. 551.

[7] Hornby *v.* Cramer, 12 How. (N. Y.) Pr. 490.

[8] Menard *v.* Crowe, 20 Minn. 448; Butterfield *v.* Farnham, 19 Minn. 85.

[9] McGovern *v.* Union Mut. L. Ins. Co. 109 Ill. 151.

place, or terms of sale, or the manner of advertising it, and no statute regulates the proceedings, the mortgagee or trustee may exercise his discretion in these matters, and if fairly exercised the sale will be valid;[1] though it would be a safe and prudent course to pursue the mode ordinarily provided for in judicial sales,[2] and a court of equity would enforce the power according to its general practice. But if the mortgage provides that the mortgagee shall advertise the time, place, and terms of sale in a prescribed newspaper, this is in effect an authority to him to fix the time, place, and terms of sale at his discretion.[3] If the deed or mortgage provide that the sale shall be made on or near the premises, or at a particular place in a town or city named, a sale at any other place would not be in pursuance of the power, and would be invalid.[4] But if it merely provide that the sale shall be in a certain town or city, the trustee or mortgagee may cause it to be made at any usual or convenient place.

1847. Sale fixed for Sunday. — The proceedings to foreclose a mortgage are not void because the day specified in the advertisement happens on a Sunday. The court in a New York case thought that a sale on Sunday might not be prohibited by the statutes of that state; but in that case, the mistake being discovered before the day of sale, a postponement to the following day was made and advertised before the day fixed for the sale; and the sale on the following day was held to be regular.[5]

1848. Sale at ruins of court-house in Chicago. — Under a deed of trust made before the destruction of this court-house, providing that any sale under it should be had at the north door of the court-house, a sale after the destruction of the court-house may be made on the ground immediately in front of the place where the north door was at the time of the execution of the deed.[6] But such a provision in a mortgage made before the destruction of the court-house does not restrict the sale to the site of the court-house then in existence, but after its destruction the sale may be advertised and made at the north door of the building then in use as a court-house.[7]

[1] Olcott *v.* Bynum, 17 Wall. 44.

[2] Calloway *v.* People's Bank of Bellefontaine, 54 Ga. 441.

[3] Calloway *v.* People's Bank of Bellefontaine, *supra.*

[4] See Rice *v.* Brown, 77 Ill. 549.

[5] Sayles *v.* Smith, 12 Wend. (N. Y.) 57; Westgate *v.* Handlin, 7 How. (N. Y.) Pr. 372.

[6] Chandler *v.* White, 84 Ill. 435; Waller *v.* Arnold, 71 Ill. 350.

[7] Alden *v.* Goldie, 82 Ill. 581; Wilhelm *v.* Schmidt, 84 Ill. 183.

After such a sale has been had, and a deed is given, in which it is recited that the sale was in due form, and according to the terms of the deed, it is held that a subsequent purchaser is not bound to look beyond the recitals of the deed.[1]

1849. Under a deed of trust providing that the sale shall take place at the "court-house door," a sale made at the door of a building temporarily used as a court-house, while repairs are making upon the court-house building, is a sufficient compliance with the terms of the deed.[2] Where a deed of trust, made after the destruction by fire of the court-house in Chicago, provided that the sale should be made "at the north door of the court-house in the city of Chicago," and the county courts were then held in a portion of a building formerly a court-house, but which had two north doors, an advertisement of a sale to be made at one of those doors was held to have been advertised to be made at the place designated in the deed.[3] If the court-house be removed after the execution of the mortgage, and established at a different place in the same town, the sale must be at the new court-house and not at the building formerly used.[4] A trust deed requiring the sale under it to be made at the court-house of the county is properly executed by a sale at the court-house of a newly organized county which includes the land sold.[5]

A notice of sale to be held at the front door of the court-house in a village named, when in fact there is no court-house, nor any place known as the court-house, in such village, is void.[6]

If the mortgage or deed of trust specifies no place of sale, the sale may be made at the court-house door, if by custom that is the place where such sales are usually made. In such case the place of sale is left to the reasonable discretion of the mortgagee or trustee.[7]

1849 *a*. Sale in newly incorporated town. — Where a mortgage was executed of land in the south part of Malden, and this part of that town was afterwards incorporated as the town of

[1] Long *v.* Rogers, 6 Biss. 416, per Blodgett, J.: "I am inclined to think that would be a good point if made at the time the sale took place. It would be good ground for stopping the sale before rights intervene; but I doubt if a purchaser would be absolutely obliged to take notice that the court-house was a ruin."

[2] Hambright *v.* Brockman, 59 Mo. 52.

[3] Gregory *v.* Clarke, 75 Ill. 485; Alden *v.* Goldie, 82 Ill. 581.

[4] Napton *v.* Hurt, 70 Mo. 497.

[5] Williams *v.* Pouns, 48 Tex. 141.

[6] Bottineau *v.* Ætna L. Ins. Co. 31 Minn. 125.

[7] Hess *v.* Dean (Tex.), 2 S. W. Rep. 727.

Everett, the same mortgagor after such incorporation executed another mortgage of the same land to the same mortgagee, describing it, as in the first mortgage, as situated in the south part of Malden, though the mortgagor then resided upon the premises within the limits of Everett. The mortgage provided for a sale of the premises "at public auction in said Malden." The notice by publication was given of a sale to take place "on the premises described in the mortgage deed, namely, a lot of land situated in the south part of Malden;" and described the lot by metes and bounds as situated on a certain street; and also described the mortgage by date and by reference to the book and page in the registry where it was recorded. In an action by the mortgagor, after a sale under such notice, claiming that the notice was insufficient, and that the sale was made at a place not authorized, it was held the notice was good and the sale was properly made upon the premises. The mortgage referred to in the notice afforded means of ascertaining the exact locality of the mortgaged land. The fact that this had been incorporated into the town of Everett was immaterial, though this fact must be presumed to have been known to the mortgagor.[1]

1850. Sale at city hall. — A notice of a sale to be made at the city hall in the city of New York was held to specify the place of sale with sufficient definiteness, inasmuch as by common usage the rotunda in the city hall proper is the established place for such sales.[2] It was said in this case, however, that except for such usage the notice would be too indefinite, as all the buildings used for holding courts within the Park are deemed in law the city hall. A notice which designates the place of sale as "at the court-house, in the city of St. Paul," is sufficient to uphold the sale, in the absence of any evidence of fraud or unfairness, or actual or probable injury.[3]

If the place of sale be left to the discretion of the trustee or mortgagee, he may make the sale at a place outside the state in which the mortgaged lands are situated; and if he acts with fairness, and the parties interested in the property are not prejudiced thereby, the sale will be sustained.[4]

1851. If a mistake be made in the advertisement, such as

[1] Colcord *v.* Bettinson, Mass. Supreme Ct. 131 Mass. 233.

[2] Hornby *v.* Cramer, 12 How. (N. Y.) Pr. 490.

[3] Golcher *v.* Brisbin, 20 Minn. 453; Thorwarth *v.* Armstrong, 20 Minn. 464.

[4] Ingle *v.* Jones, 43 Iowa, 286.

would render a sale under it irregular or voidable, the mortgagee may waive the proceedings and advertise anew; or he may avail himself of his right to seek his remedy by foreclosure in a court of chancery.[1] Where the mistake was that the day of sale fell on Sunday, and the new notice fixing a different day for the sale claimed a different amount as due, it was held that there was nothing in the proceedings that enabled the mortgagor to avoid the sale.[2] A clerical mistake in the notice of sale will not invalidate the title of a *bonâ fide* purchaser who had no notice of the mistake and was in no way responsible for it.[3]

1852. Any error in the announcement of the sale which would naturally mislead the public, or deter persons from attending the sale and bidding, will render the sale irregular and void. Such would be the effect of an erroneous statement that the premises would be sold for default of three mortgages when in fact there were but two, the third being upon other land.[4]

A change in the time appointed for the sale after notice has once been given, if the mortgagor is thereby misled to his prejudice, avoids the sale though the notice was published for the requisite length of time after the change.[5] When a sale is adjourned to a future day, but the notice of it as published is for a different day, the sale will be void.[6] Such also may be the effect of an advertisement of sale in which the day of the week and day of the month fixed for it are not coincident;[7] or one in which the sale was by mistake fixed for the wrong year.[8] But where the advertisement stated the day of the month correctly but gave the wrong day of the week, and the mistake was corrected in the notice published the day before the sale, there being no evidence of any intention to mislead, a bill in equity to set aside the sale for irregularity was dismissed.[9]

Where a notice of sale under a deed of trust described three notes secured by it, one of them not being due, and recited that the trustee had been called upon to sell the property for the payment of two of them, there is no implication that the trustee intended to sell for the payment of all of the notes, and the notice

[1] Atwater *v.* Kinman, Harr. (Mich.) 243.

[2] Banning *v.* Armstrong, 7 Minn. 46.

[3] Mitchell *v.* Nodaway Co. 80 Mo. 257.

[4] Burnet *v.* Denniston, 5 Johns. (N. Y.) Ch. 35. See, also, Hubbell *v.* Sibley, 5 Lans. (N. Y.) 51; *S. C.* 50 N. Y. 468.

[5] Dana *v.* Farrington, 4 Minn. 433.

[6] Miller *v.* Hull, 4 Den. (N. Y.) 104.

[7] Calloway *v.* People's Bank of Bellefontaine, 54 Ga. 441, 450.

[8] Fenner *v.* Tucker, 6 R. I. 551.

[9] Chandler *v.* Cook, 2 McArthur (D. C.) 176.

is not open to objection.[1] A notice is not objectionable as misleading for the reason that it does not mention that all the notes have been paid but one, when it recites in general terms that default had been made.[2]

An error in stating the amount of an attorney's fee stipulated for in the mortgage will not, in the absence of fraud or prejudice to the owner of the land, invalidate the sale.[3]

1853. Sale of equity of redemption. — A power of sale in a first mortgage which authorizes the mortgagee to advertise and sell at auction the mortgaged premises, including all equity of redemption of the mortgagor, gives no authority to sell the equity of redemption alone; and if the advertisement states only that the equity of redemption will be sold, it is insufficient, and the sale under it is invalid. Any one wishing to purchase could only infer from the advertisement that he could buy an estate on which the incumbrance would continue.[4] But an advertisement by a second mortgagee of "all the right, title, interest, and estate which, by virtue of the power contained in said mortgage and the assignments thereof, I have the right to sell, in and to" the mortgaged premises, is not defective, though the power was to sell the granted premises subject to a prior mortgage. The legal effect of the advertisement is the same as if the language of the mortgage had been used, and could mislead no one.[5]

On the other hand, the mortgagee cannot sell a greater interest than his mortgage gives him authority to sell. Holding a junior mortgage, he cannot sell the entire estate free from incumbrances; but he must sell subject to the incumbrances having precedence of his mortgage.[6] He cannot sell the entire estate as unincumbered, although the auctioneer at the sale states the ex-

[1] Tooke *v.* Newman, 75 Ill. 215.

[2] Bush *v.* Sherman, 80 Ill. 160.

[3] Swenson *v.* Halberg (C. C. Minn. 1880), 1 Fed. Rep. 444.

[4] Fowle *v.* Merrill, 10 Allen (Mass.), 350; Donohue *v.* Chase, 130 Mass. 137, per Endicott, J.: —

"A mortgagee has the right to sell, under a power contained in his mortgage, the whole title of the mortgagor and of himself in the land mortgaged; that is, he may sell the equity of redemption of the mortgagor, and such interest as is conveyed to him by the mortgage under which he sells. But he cannot sell the equity of redemption of the mortgagor by itself; nor can he sell an undivided portion of his interest in the land included in the mortgage. Such sales would pass no title to the purchaser, and would not affect the mortgagor's right to redeem, or the mortgagee's own right to foreclose. A proper execution of the power of sale contained in the mortgage requires the mortgagee to sell all he is entitled to sell under it."

[5] Model Lodging House Asso. *v.* Boston, 114 Mass. 133.

[6] Donohue *v.* Chase, *supra.*

istence of the prior mortgage, and says it may remain at the option of the purchaser; and the deed delivered to the purchaser also states that he assumes and agrees to pay the first mortgage as part of the consideration. The mortgagee can sell under the power only what was conveyed to him, namely, an equity of redemption.[1] The consent of the prior incumbrancers to such a sale would bind them, but would not make the sale valid as against the owner of the equity of redemption.[2] The latter, however, might affirm such a sale, and he would affirm it by receiving any surplus there might be, or by bringing suit for such surplus.[3]

1854. Unimportant omissions. — If the notice contain such facts as reasonably apprise the public of the time, place, and terms of sale, and describes the property sufficiently, mere omissions or inaccuracies not calculated to mislead any one are not to be regarded; as where a notice stated that the property would be sold for cash at the court-house door in the town of Hillsboro, without naming the county, or stating that the sale would be at public vendue to the highest bidder.[4]

It need not state the terms of sale, or that the terms would be stated at the time of sale; and if at the sale a deposit is required, and this prevented a person present from bidding, if the mortgagee acted in good faith, and the requiring of a deposit was usual and reasonable, this does not invalidate the sale.[5]

The advertisement need not be dated. The time of its first appearance by publication will be taken as the date.[6]

It is not necessary that the advertisement of a sale under a power should state that a default has occurred in the performance of the condition of the mortgage. The statement, that the sale is by virtue of the power given by the mortgage, necessarily implies that there has been a default.[7]

1855. A statutory requirement that the notice shall state the amount claimed to be due at the time of the first publica-

[1] Dearnaley *v.* Chase, 136 Mass. 288.

[2] Cook *v.* Basley, 123 Mass. 396.

[3] O'Connell *v.* Kelly, 114 Mass. 97; and see Morton *v.* Hall, 118 Mass. 511; Alden *v.* Wilkins, 117 Mass. 216.

[4] Powers *v.* Kueckoff, 41 Mo. 425. See, also, Gray *v.* Shaw, 14 Mo. 341; Beatie *v.* Butler, 21 Mo. 313; Hornby *v.* Cramer, 12 How. (N. Y.) Pr. 490.

[5] Model Lodging House Asso. *v.* Boston, 114 Mass. 133; Goodale *v.* Wheeler, 11 N. H. 424; Pope *v.* Burrage, 115 Mass. 282; Wing *v.* Hayford, 124 Mass. 249.

[6] Ramsey *v.* Merriam, 6 Minn. 168.

[8] Model Lodging House Asso. *v.* Boston, *supra;* and see King *v.* Bronson, 122 Mass. 122.

tion is sufficiently met by a statement of the amount claimed to be due at a certain prior date, and that the mortgagee claims that sum with interest from that time.[1] If only a part of the mortgage debt be due, it is the usual and safer way to state both the whole amount of the debt and the amount of it which has become payable.[2] The fact that the notice states a larger sum to be due than is actually due does not affect the validity of the sale, if no actual injury or fraudulent purpose is shown.[3] Although an excessive claim might have the effect to deter bidders, it cannot be inferred in the absence of proof that it actually had this effect. If the mortgagee should bid up to the amount of his excessive claim, and take the property, he would be obliged to pay to the mortgagor the excess over what was legally due.[4]

It is not necessary, in the absence of a statutory requirement or of a requirement in the mortgage deed, that the amount due, for which the property is sold, should be stated.[5]

1856. In advertising a sale under a second mortgage it is not essential to state the amount due upon the first mortgage, even if both mortgages are held by the same person. And if the mortgagee at the sale slightly overestimates the amount due on that mortgage, it is immaterial.[6]

IX. *Sale in Parcels.*

1857. Generally there is no obligation to sell in parcels, except where such a sale is required by statute, or where special equities, which the mortgagee is bound to respect, have arisen as to portions of the premises.[7] Even when the mortgagor has alienated a part of the mortgaged property, and upon equitable grounds the purchaser is entitled to have the part of the premises not alienated first sold under the power, he must apply to a court of chancery before the sale for an order directing the sale to be so

[1] Judd *v.* O'Brien, 21 N. Y. 186, 189; Hoyt *v.* Pawtucket Inst. for Savings, 110 Ill. 390.

[2] Jencks *v.* Alexander, 11 Paige (N. Y.), 619, 626.

[3] Fairman *v.* Peck, 87 Ill. 156; Hamilton *v.* Lubukee, 51 Ill. 415; Jencks *v.* Alexander, *supra*; Klock *v.* Cronkhite, 1 Hill (N. Y.), 107; White *v.* McClellan, 62 Md. 347.

[4] Butterfield *v.* Farnham, 19 Minn. 85; Bennett *v.* Healey, 6 Minn. 240; Bailey *v.* Merritt, 7 Minn. 159; Ramsey *v.* Merriam, 6 Minn. 168; Spencer *v.* Annon, 4 Minn. 542; Spottswood *v.* Herrick, 22 Minn. 458; Seiler *v.* Wilber, 29 Minn. 307.

[5] Jenkins *v.* Pierce, 98 Ill. 646.

[6] Model Lodging House Asso. *v.* Boston, 114 Mass. 133.

[7] Loveland *v.* Clark (Colo.), 18 Pac. Rep. 544; Gray *v.* Shaw, 14 Mo. 341; Singleton *v.* Scott, 11 Iowa, 589.

made; and if he does not do this he cannot apply to have the sale set aside as against a *bonâ fide* purchaser.[1] There is generally no obligation upon him to sell in lots in order to obtain a greater price.[2] The deed generally empowers the mortgagee to sell the whole estate upon any default, and to pay the entire debt from the proceeds; and usually makes no provision in regard to the sale of the property in parcels.[3] The mortgagee may nevertheless sell in parcels when the property will bring a better price by this mode of sale. After he has advertised the property to be sold in lots, the sale should be made accordingly. When the sale is made in parcels, it must stop when enough has been realized to pay the debt and expenses; for the debt being paid, the power of sale is exhausted.[4]

It is true, however, that some courts have adopted the rule that all forced sales of property shall be made in parcels, when the lots are sufficiently distinct both in law and in fact to render distinct sales practicable.[5] In such case, when the property is susceptible of division, a sale of the entire premises together will vitiate the sale, and a court of equity may set it aside.[6]

In some states it is provided by statute that when the mortgaged premises consist of distinct farms or lots they shall be sold separately, and that the sale shall cease when a sufficient sum has been realized to satisfy the debt.[7] The distinct farms or lots intended by this provision are not such as are formed by a highway or by section lines crossing a farm mortgaged as one tract, but separate and distinct lots or farms not forming together one lot

[1] St. Joseph Manufacturing Co. *v.* Daggett, 84 Ill. 556. See Meacham *v.* Steele, 93 Ill. 135; Hosmer *v.* Campbell, 98 Ill. 572.

[2] Adams *v.* Scott, 7 W. R. 213; Cleaver *v.* Green, 107 Ill. 67; Abbott *v.* Peck, 35 Minn. 499; Grover *v.* Fox, 36 Mich. 461. As to sales in parcels under decree of court, see §§ **1616–1619**.

[3] Connolly *v.* Belt, 5 Cranch C. C. 405.

[4] Charter *v.* Stevens, 3 Den. (N. Y.) 33; Baker *v.* Halligan, 75 Mo. 435; Curry *v.* Hill, 18 W. Va. 370.

[5] Rowley *v.* Brown, 1 Binn. (Pa.) 61. This was a sale on execution. The court say: "It is the rule of this court to disallow in every case a lumping sale by the sheriff, where from the distinctness of the items of the property he can make distinct sales. It is essential to justice and to the protection of the unfortunate debtors that this should be the general rule. Any other would lead to the most shameful sacrifices of property. There may be exceptions, but the purchaser must bring himself within them."

[6] Sumrall *v.* Chaffin, 48 Mo. 402; Chesley *v.* Chesley, 49 Mo. 540; *S. C.* 54 Mo. 347, and cases cited.

[7] **New York: § 1751.**
Wisconsin: § 1762.
Mississippi: § 1744.
Minnesota: § 1743.
Michigan: § 1741.
Dakota T.: § 1728.

or farm are intended.[1] If such separate lots were fenced and used as one parcel when the mortgage was given, and continued to be so fenced and used, all can be sold as one parcel.[2]

A sale contrary to such a statute will not be disturbed in the absence of fraud or prejudice to the mortgagor or owner of the equity of redemption.[3]

If after a release of a portion of the premises the remainder can be sold in distinct parcels, a sale of the whole together, when this would be prejudicial to the owner, is void.[4]

A party interested in the equity of redemption, who for a valuable consideration has waived his right to redeem, cannot object that the sale was not made in parcels, for the requirement is made in the interest of those entitled to redeem, and to protect this right in each parcel separately.[5] For the same reason the mortgagee cannot take this objection to his own proceedings.[6]

The fact that a parcel not covered by the mortgage is sold with a parcel covered by it, as one tract and for one gross sum, does not avoid the sale of the mortgaged land.[7]

1858. Under a statute requiring a sale in parcels a mortgagee is not justified in selling the entire property in one lot when any one interested in the equity of redemption requests a sale in parcels, and offers in good faith to bid the amount of the mortgage debt and expenses for a part of the property so situated that it may be conveniently sold separately.[8] But a mortgagee is not bound to sell in parcels without request where the division into parcels was not made until after the execution of the mortgage. The mortgagee is often in no situation to know of subsequent divisions of the property; and a sale, therefore, in one entire parcel, should be held to be good unless a request to divide it be shown.[9]

In some cases it has been said that if the premises at the time of the mortgage consisted of one tract, and were so described, the mortgagee is not bound to sell in parcels, although the land has

[1] Larzelere *v.* Starkweather, 38 Mich. 96; Yale *v.* Stevenson, 58 Mich. 537; Hull *v.* King (Minn.), 37 N. W. Rep. 792.

[2] Yale *v.* Stevenson, *supra;* Maxwell *v.* Newton, 65 Wis. 261.

[3] Swenson *v.* Halberg (C. C. Minn. 1880), 1 Fed. Rep. 444.

[4] Dunn *v.* Fish (Mich. 1881), 9 N. W. Rep. 429.

[5] Clark *v.* Stilson, 36 Mich. 482.

[6] Clark *v.* Stilson, *supra.*

[7] Bottineau *v.* Ætna L. Ins. Co. 31 Minn. 925.

[8] Ellsworth *v.* Lockwood, 42 N. Y. 89. In this case, although the premises were described in the mortgage as one tract, the mortgage authorized a sale of "any part or parts" of it.

[9] Ellsworth *v.* Lockwood, 9 Hun (N. Y.), 548; Shannon *v.* Hay, 106 Ind. 589; Kline *v.* Vogel, 11 Mo. App. 211.

subsequently been divided into lots,[1] and although he is requested by one interested in the equity to sell in lots according to a plan.[2] When the mortgage describes the land as one tract, it is said that it is the right of the mortgagee by the contract to sell the whole of the mortgaged premises in satisfaction of his debt; but the better opinion would seem to be that the obligation to sell in lots has reference to the situation of the property at the time of sale, irrespective of the description in the mortgage.[3]

The criterion in all cases is, What mode of sale will realize the largest amount of money? If this object can be obtained by the sale of the whole mortgaged premises together, that is the proper mode to pursue, even if they are readily divisible. If the land is divisible into separate parcels, and is better adapted for use in parcels, then the presumption would seem to be that it would produce a larger amount of money if sold in that way, and the sale should be made accordingly.[4]

1859. A trustee under a deed of trust is bound to render the sale as beneficial as possible to the debtor; and even in the absence of any provision in the deed for a sale of a part of the property, or for selling it in parcels if it be susceptible of division and will bring more by sale in separate parcels, or if a sale of a part will satisfy the debt, he is bound to act accordingly;[5] and a sale not so made will be held invalid on application of the party injured.[6] The trustee must exercise a sound discretion in selling, and must sell the land as a whole where it will sell for more in this way than in parcels;[7] and in parcels when it will sell better in this way. The intervention and assist-

[1] Lamerson *v.* Marvin, 8 Barb. (N. Y.) 9.

[2] Griswold *v.* Fowler, 24 Barb. (N. Y.) 135. Although consisting of two tracts, if they have previously been held and used together as one farm, a sale of the whole in one parcel is good. Anderson *v.* Austin, 34 Barb. (N. Y.) 319.

[3] Ellsworth *v.* Lockwood, 42 N. Y. 89; *S. C.* 9 Hun (N. Y.), 548; Durin *v.* Fish, 46 Mich. 312; 9 N. W. Rep. 429; Keyes *v.* Sherwood (Mich.), 39 N. W. Rep. 740; Curry *v.* Hill, 18 W. Va. 370.

[4] Wells *v.* Wells, 47 Barb. (N. Y.), 416. See, also, American Ins. Co. *v.* Oakley, 9 Paige (N. Y.), 259; Slater *v.* Maxwell, 6 Wall. 268, 275; Lalor *v.* McCarthy, 24 Minn. 417.

[5] In Olcott *v.* Bynum, 17 Wall. 44, 62, where express authority was given to sell all the property upon the failure to pay any instalment of the debt secured at maturity, Mr. Justice Swayne said: "If enough of it to satisfy the amount due could be segregated and sold without injury to the residue, it would have been the duty of the mortgagees so to sell."

[6] Tatum *v.* Holliday, 59 Mo. 422; Goode *v.* Comfort, 39 Mo. 313; Gray *v.* Shaw, 14 Mo. 341; Taylor's Heirs *v.* Elliott, 32 Mo. 172, 175.

[7] Singleton *v.* Scott, 11 Iowa, 589; Kellogg *v.* Carrico, 47 Mo. 157; Carter *v.* Abshire, 48 Mo. 200; Torry *v.* Fitzgerald, 32 Gratt. (Va.) 843.

ance of a court of equity may be invoked in a proper case, to control the trustee in the exercise of his discretion, either to sell the land as a whole or to sell it in parcels.[1] But a sale once made will not be set aside merely on the ground that the property was sold as a whole when it was capable of easy division. It must appear further that the interests of the debtor were sacrificed;[2] or that there was some attendant fraud or unfair dealing.[3]

The mortgage is usually so drawn that the whole debt becomes due upon any default;[4] but even when this is not the case, upon a default in the payment of an instalment of interest or of principal the whole mortgaged estate may be sold when a sale of a part would greatly impair the whole.[5] A sale of the whole estate, or of even a part of it, for an instalment only of the mortgage debt, exhausts the power and the mortgage lien.[6]

A railway conveyed by a trust deed or mortgage to secure bonds may generally be sold all together upon a default in the payment of interest, or of an instalment of the principal, before the maturity of the entire principal of the debt; because it would generally be the case that the line of road could not be divided and sold in pieces without manifest injury to the property. The fact that the road is situated in two or more states, and was originally owned by two corporations created in different states, does not affect the determination of this question.[7]

1860. Sale of sufficient only to pay the debt. — When a mortgage or trust deed authorizes the sale of the whole premises upon a default, a sale of the whole is regular, and as a rule no court will interfere with the exercise of the power in this way. Yet it has been held, where the policy of the laws of a state seemed to require that all forced sales of land should be confined to such portions of the premises as are sufficient to satisfy the debt, that a court of equity might interpose to prevent the full exercise of the power if the lands are divisible. But this is an interference with the contract of the parties which the courts will

[1] Torry *v.* Fitzgerald, 32 Gratt. (Va.) 843.

[2] Chesley *v.* Chesley, 54 Mo. 347; Ingle *v.* Jones, 43 Iowa, 286; Shine *v.* Hill, 23 Iowa, 264; Fairman *v.* Peck, 87 Ill. 156.

[3] Benkendorf *v.* Vincenz, 52 Mo. 441; Ross *v.* Mead, 10 Ill. (5 Gil.) 171; Gillespie *v.* Smith, 29 Ill. 473.

[4] § **1181**; Seaton *v.* Twyford, L. R. 11 Eq. Cas. 591; Philips *v.* Bailey, 82 Mo. 639.

[5] Olcott *v.* Bynum, 17 Wall. 44; Dunham *v.* Cin., Peru, &c. Railway Co. 1 Ib. 254; Pope *v.* Durant, 26 Iowa, 233; Salmon *v.* Clagett, 3 Bland (Md.), 125.

[6] Fowler *v.* Johnson, 26 Minn. 338; Standish *v.* Vosberg, 27 Minn. 175; Pryor *v.* Baker, 133 Mass. 459.

[7] Wilmer *v.* Atlanta & Richmond Air Line R. R. Co. 2 Woods, 447.

not make unless very strong reasons exist for so doing.[1] The trustee or mortgagee may advertise the whole of the lands, for until the property is actually offered for sale it cannot be known with certainty how much of it will be necessary to satisfy the mortgage debt.[2] The whole of the mortgaged lands must be sold together if they cannot be divided without injuriously affecting the sale or the value of the part not sold.[3]

Although the debt be payable in instalments, and only one of them is due, a sale of the whole estate may be made. The power contemplates only one sale, and the statutes do not provide for a sale subject to future instalments.[4]

X. *Conduct of Sale, Terms, and Adjournment.*

1861. Mortgagee may act by attorney. — The entry upon the premises authorized by the power, the giving of the notice of sale, and the conduct of the sale, are acts which the mortgagee may perform through others, whose authority need not be under seal or in writing.[5] He may employ an auctioneer to make the sale, and his personal presence at the time and place of sale is not essential.[6] In general he may employ an agent or attorney to do any acts which are merely ministerial, and which involve no exercise of discretionary powers.[7] Of course he makes himself responsible for his agent's acts; and if he allows his agent to receive the proceeds of sale, and they are lost or misapplied, he

[1] Johnson *v.* Williams, 4 Minn. 260.

[2] Cleaver *v.* Mathews (Va.), 3 S. E. Rep. 439.

[3] Michie *v.* Jeffries, 21 Gratt. (Va.) 334.

[4] Barber *v.* Cary, 11 Barb. (N. Y.) 549; Bunce *v.* Reed, 16 Ib. 347; Cox *v.* Wheeler, 7 Paige (N. Y.), 248; McLean *v.* Presley, 56 Ala. 211. See Pryor *v.* Baker, 133 Mass. 459.

It has been held, however, that there may be successives sales of the property to pay instalments of the debt secured. Thus, where a trust deed secured three promissory notes payable at intervals of a year, the holder of the note first maturing sold the property under the power of sale, and bid in the property in satisfaction of the note. The amount bid was about one third of the value of the property; and the holder of the note, the trustee, and the debtor all knew that the two other notes were still outstanding, and held by another person; and that the sale was made in satisfaction of the first note only. The debtor redeemed the land from the sale, and the holder of the other two notes brought suit to foreclose them. It was held that the last two notes were still a lien on the land, and that the property might be foreclosed and sold in satisfaction of these notes. Shields *v.* Dyer (Tenn.), 5 S. W. Rep. 439.

[5] Hoit *v.* Russell, 56 N. H. 559; Cranston *v.* Crane, 97 Mass. 459; Yourt *v.* Hopkins, 24 Ill. 326; Watson *v.* Sherman, 84 Ill. 263.

[6] Fogarty *v.* Sawyer, 23 Cal. 570.

In **Rhode Island** no officer of any corporation shall act as auctioneer in the foreclosure of any mortgage held by such corporation. P. S. 1882, ch. 137, § 9.

[7] Hubbard *v.* Jarrell, 23 Md. 66, 82.

cannot sue the mortgagor for the debt; or if he concurs with an assignee from the mortgagor of the equity of redemption in selling the property, and allows him to receive the purchase money, he may be perpetually restrained from suing the mortgagor for the debt.[1] It is not necessary that the mortgagee be personally present at the sale. This may be conducted by his attorney, whose acts he ratifies by subsequently making the deed necessary to convey the property.[2]

1862. But a trustee under a deed of trust should be personally present at the sale, so that he may, if necessary to prevent a sacrifice of the property, adjourn the sale, which it would be clearly his duty to do; therefore his absence at the sale has been held to render the sale void.[3] He must, moreover, be present during the whole sale; it is not sufficient that he is present at its opening and close, if he be absent during its progress.[4] He is bound to adopt all reasonable precautions to render the sale beneficial to the debtor; a bare compliance with the terms of the power is not enough. He must to this end exercise a reasonable judgment or discretion in respect to advertising the property and conducting the sale. In respect to all duties which are not merely mechanical or ministerial, and are not prescribed by the terms of the deed, a special trust and confidence are reposed in him, and he cannot delegate these to an agent.[5]

He has an undoubted right, however, to employ an auctioneer to sell the lands conveyed, provided he is himself present at the sale, directing and controlling it.[6]

The sale must be made by the person authorized in the deed to make it. He cannot act by an agent, unless the deed expressly provides that he may do so.[7] Thus if the deed provides that the

[1] Palmer *v.* Hendrie, 28 Beav. 341.

[2] Munn *v.* Burges, 70 Ill. 604; McHany *v.* Schenk, 88 Ill. 357; Parker *v.* Banks, 79 N. C. 480; Welsh *v.* Coley (Ala.), 2 So. Rep. 733. Otherwise in Texas: Dunlap *v.* Wright, 11 Tex. 597; Harris *v.* Catlin, 53 Tex. 8; Crafts *v.* Dougherty, 6 S. W. Rep. 850; Bitter *v.* Calhoun, 8 S. W. Rep. 523.

[3] Landrum *v.* Union Bank of Mo. 6 Mo. 48; Vail *v.* Jacobs, 62 Mo. 130; Graham *v.* King, 50 Mo. 22; Bales *v.* Perry, 51 Mo. 449; Singer Manufacturing Co. *v.* Chalmers, 2 Utah, 542; Wicks *v.* Westcott, 59 Md. 270. In Connolly *v.* Belt, 5 Cranch C. C. 405, it was held that the trustee might depute a competent agent to attend the sale and conduct it; and in the absence of a statute requiring the trustee to be present, the sale would be valid. This case seems to be approved in Smith *v.* Black, 115 U. S. 308.

[4] Brickenkamp *v.* Rees, 69 Mo. 426.

[5] Bales *v.* Perry, 51 Mo. 449.

[6] McPherson *v.* Sanborn, 88 Ill. 150; Taylor *v.* Hopkins, 40 Ill. 442.

[7] Hess *v.* Dean (Tex.), 2 S. W. Rep. 727; Grover *v.* Hale, 107 Ill. 638.

sale shall be made by the United States marshal, a deputy cannot act as auctioneer, and make the sale in the absence of the marshal.[1]

If the deed be to two trustees, either of whom is authorized to sell on default, and both join in giving notice and in executing the deed to the purchaser, the power is well executed, although but one attended the sale.[2] But a sale at which only one of two trustees was present is invalid, unless the deed expressly provides that one may act alone; and it is not rendered valid by the absent trustee's ratifying the sale and joining in the deed, with no information as to the state of affairs at the sale.[3]

1863. The power generally provides that the sale shall be by public auction, and in such case there can be no valid private sale. If the power allows of either mode, a private sale made in good faith and for a fair price is good, even without any advertisement.[4] If the authority be to sell by private contract, a sale at auction would not, it is conceived, be justified;[5] for the object in authorizing a private sale may be supposed to be the obtaining of a better price than would ordinarily be realized by an auction sale. If the power contains no restriction or provision as to the mode of sale, the mortgagee may sell at private sale as well as by public auction, though as a general rule a sale by auction would be the safer and better course. If the power makes provision for a sale by auction, prescribing the place of sale and the length of time the notice shall be advertised, this precludes the right to sell at private sale.[6]

1864. The terms of sale, while they should properly make it safe for the mortgagee, should not be so stringent as to deter persons from attending the sale and bidding. If the conditions are such as to have this effect the sale may be avoided. Not only must the mortgagee adhere strictly to the terms of the power, but in the trust relation in which he stands towards the persons interested in the equity of redemption he is bound to adopt proper means to get a reasonable price for the property.[7] There should

[1] Singer Manufacturing Co. *v.* Chalmers, 2 Utah, 542.

[2] Weld *v.* Rees, 48 Ill. 428; Smith *v.* Black, 115 U. S. 308.

[3] Black *v.* Smith, 4 McAr. (D. C.) 338.

[4] Davey *v.* Durant, 1 De G. & J. 535; Brouard *v.* Dumaresque, 3 Moore P. C. C. 457; Montague *v.* Dawes. 12 Allen (Mass.), 397; Lawrence *v.* Farmers' Loan & Trust Co. 13 N. Y. 200; Elliott *v.* Wood, 45 N. Y. 71.

[5] See Daniel *v.* Adams, Amb. 495.

[6] Griffin *v.* Marine Co. of Chicago, 52 Ill. 130.

[7] Falkner *v.* Equitable Reversionary Society, 4 Drew. 352; Matthie *v.* Edwards 2 Coll. 465.

be no special conditions for the advantage of any third person, such as might depreciate the property. Any condition that a prudent and reasonable owner would impose when selling in his own right is justifiable in a sale by the mortgagee under the power. The mortgagee may make reservations for the benefit of the owner of the equity of redemption, as, for instance, a reservation of a growing crop.[1]

If the mortgage provides for a sale for cash, the sale is not vitiated by an announcement at the time of sale that payment in gold and silver or legal tender currency will be required within twelve or twenty-four hours after the sale, when no fraudulent purpose in making such terms is shown.[2]

1865. The acquiescence of the mortgagor in the conduct of the sale, and particularly in the terms of it, will cure any defect in this respect and give validity to it.[3] In *Markey* v. *Langley* the mortgagor was present at the sale, and made no objection to the terms and conditions of it, and his acquiescence was held to conclude him from making objection afterwards. The case of *Taylor* v. *Chowning* is to the same effect.

1866. Payment at time of sale. — In fixing the terms of payment for a sale under a mortgage or trust deed, the mortgagee or trustee is bound to act fairly and with proper discretion. It is usual to require a deposit at the time of sale of a reasonable sum to cover the expenses of sale, and insure the completion of it by the purchaser. If the payment of the whole amount of the purchase money be arbitrarily required at the time of sale, or within an hour's time after it, against the remonstrances of persons in attendance at the sale, the sale will be set aside.[4] It must be

[1] Sherman *v.* Willett, 42 N. Y. 146. If a mortgagee in possession, upon making a sale, reserves the crops or the rents for the year, and himself becomes the purchaser at the sale, he is liable for the crops or rents upon a subsequent redemption by the mortgagor. Roulhac *v.* Jones, 78 Ala. 398.

[2] Lallance *v.* Fisher (W. Va.), 2 S. E. Rep. 775.

[3] Taylor *v.* Chowning, 3 Leigh (Va.), 654; Markey *v.* Langley, 92 U. S. 142; Olcott *v.* Bynum, 17 Wall. 44, 64. In the latter case there had been a sale of land in North Carolina under a power in the year 1860. When the bill was filed to set it aside, nearly eight years had elapsed. The mortgagor resided in New York, and the other parties in interest in North Carolina. Mr. Justice Swayne said: "Making allowance for the difficulty of intercourse between the North and the South during the war, there was acquiescence, express and implied, for three years after the war ceased. This, if not conclusive, weighs heavily against the complainant."

[4] Goldsmith *v.* Osborne, 1 Edw. (N. Y.) Ch. 560, 562. See Model Lodging House Asso. *v.* Boston, 114 Mass. 133; Maryland Land & Build. Soc. *v.* Smith, 41 Md. 516. See § **1613**.

shown, however, that this requirement had the effect of keeping persons present from bidding.[1] A requirement, not of the immediate payment of the entire purchase money, but of a deposit of a sum unusually large, and not proportioned to the value of the property, would have the same effect in invalidating the sale. It is not unreasonable to require the payment of $500 down upon a sale under a mortgage for $8,000, although the advertisement of the sale did not state that such a payment would be required, but did state that the terms of sale would be stated at the time of sale. At such a sale a person who had been requested by the mortgagor, who was present, to run up the estate for him, having bid it off and not having $500 with him to pay, and not asking any delay, the estate was put up again and sold for a less sum. It was held that there was no evidence in these circumstances of fraud or unfairness in the sale.[2]

In a case in Maryland, property worth at least $6,600 was purchased by the mortgagee for $1,600; and it further appeared that it had previously been struck off to another purchaser for the sum of $2,375, who tendered about half of this in cash, and stated that he would pay the balance on the ratification of the sale as required by the laws of that state, and offered sufficient security for this. The mortgagee declined to receive the money, as not in conformity with the terms of sale, which were for cash; and upon a subsequent offer of the property the mortgagee purchased it. The sale was set aside. Mr. Justice Stewart, delivering the opinion of the court, said the mortgagee had "misapprehended the nature of his duty as trustee, which required an advantageous sale of the property for the benefit of all the parties interested. . . . There is this difference, however, between the trustee and the mortgagee, which should never be forgotten by the latter: that he has a personal interest in the proceeding, and that the mortgagor has, notwithstanding, reposed full trust and confidence in his strict impartiality, and that there must be ample reciprocity on his part by a fair and just discharge of his duty."[3]

The actual payment of the deposit may be waived without affecting the validity of the sale. Thus where land had been sold under a power for more than enough to satisfy the mortgage debt,

[1] Goode *v.* Comfort, 39 Mo. 313, 326; Jones *v.* Moore, 42 Mo. 413.

[2] Wing *v.* Hayford, 124 Mass. 249.

[3] Horsey *v.* Hough, 38 Md. 130; cited with approval by Mr. Justice Swayne, in Markey *v.* Langley, 92 U. S. 142, 154.

the validity of the sale was objected to because the purchaser had not paid down fifty dollars in cash as required by the terms of the sale. It appeared that the purchaser, when he bid off the property, did not have that sum, but the auctioneer agreed to advance it, and told the mortgagee that the purchaser had paid it, and that the money was ready for him. It was held that this arrangement, not objected to by the mortgagee at the time, had the effect of a payment of the mortgage debt to the amount of such sum of fifty dollars, and that the validity of the sale could not be objected to because the purchaser did not actually pay over this sum. If the purchaser had actually paid the deposit to the auctioneer, the mortgagee would have been obliged to look to him for it, just as he is obliged to look to him for it under the agreement made.[1]

1867. Time for examination of title. — Among other conditions of sale it is usual to provide that a certain time shall be allowed the purchaser for the examination of the title before the purchase money is payable. If unexpected difficulties occur in completing the examination of title, or in making the title satisfactory to the purchaser, much more time than that stipulated for may be necessary. In such cases time is not generally considered of the essence of the contract.[2]

1868. Giving credit. — In general it may be said that where a power of sale does not expressly authorize the mortgagee to give credit, or to accept a mortgage in part payment of the purchase money under the sale to be made by him, a sale for cash is contemplated, and he would not be authorized to give credit for more than the amount of the debt due him, as the mortgagor or subsequent incumbrancers are entitled to receive the surplus remaining after the payment of the mortgage debt in cash. The persons entitled to the surplus could, of course, by subsequent agreement, waive this right, and join the mortgagee in giving credit for the amount coming to them.

A purchaser at the sale is, of course, chargeable with notice of any requirement contained in the mortgage as to credit, and with notice of any irregularity attending the sale in this respect; but a remote purchaser is not chargeable with such notice.[3] If a requirement that the sale be for cash be substantially, though not literally, complied with, and no injury be done to the mortgagor, no objection can be taken to the sale.[4]

[1] Farnsworth *v.* Boardman, 131 Mass. 115.

[2] Hobson *v.* Bell, 2 Beav. 17.

[3] Johnson *v.* Watson, 87 Ill. 535.

[4] Ballinger *v.* Bourland, 87 Ill. 513.

If a deed of trust provides for a sale for cash, a decree for the sale of the trust property should conform to the terms of the deed, unless all the parties in interest consent to a change of the terms.[1] If the power of sale provides that the sale shall be for cash, the validity of it is not affected by giving credit.[2] If, upon a sale under a power to sell for cash, the purchaser gives his check, which is good, and it is accepted as cash, he complies with the requirement.[3]

1869. When the power does not prescribe the terms of sale, the sale may properly be for cash, even where it is customary to give credit on foreclosure sales.[4] In Maryland, where sales under powers must be reported to the court and confirmed to make them valid, an objection to a sale for cash as harsh and inequitable can be taken only upon the ratification of the sale, and is no ground for enjoining it.[5]

1870. If the mortgagee may sell for cash or credit he must use his discretion fairly. When by the terms of the power he is authorized to use his discretion in this respect, he must use it fairly in the interest of the mortgagor, and not merely for his own interest; and if the property is subject also to other liens, the mortgagee in selling under his power is a trustee for them, as well as for the mortgagor. Whether he shall sell for cash or for credit or for both, when expressly authorized to do either, is a matter for his discretion, to be fairly exercised for the benefit of all concerned. "He must regard the interest of others as well as his own. He should seek to promote the common welfare. If he does this, and keeps within the scope of his authority, a court of equity will in nowise hold him responsible for mere errors of judgment, if they have occurred, or for results, however unfortunate, which he could not have anticipated."[6]

1871. The mortgagee may, in making the sale, take all the risk of the credit or for the purchase money upon himself; and charge himself with the whole proceeds, and then pay the surplus in cash to the owner of the equity of redemption, or others entitled to it. With this limitation, neither the mortgagor nor other parties interested in the property can object to the giving of credit, for this affords an opportunity to make a better sale, and

[1] Wood *v.* Krebbs, 33 Gratt. (Va.) 685.

[2] Mewburn *v.* Bass (Ala.), 2 So. Rep. 520.

[3] McConneaughey *v.* Bogardus, 106 Ill. 321; Carey *v.* Brown, 62 Cal. 373.

[4] Olcott *v.* Bynum, 17 Wall. 44.

[5] Powell *v.* Hopkins, 38 Md. 1.

[6] Markey *v.* Langley, 92 U. S. 142, per Mr. Justice Swayne.

is for the benefit of all parties.[1] Although the deed itself provides that the sale shall be made for cash, the mortgagee may give credit for that part of the proceeds coming to him;[2] and where the premises have subsequently become incumbered by other liens, the holders of which are satisfied to take the notes of the purchaser at the foreclosure sale, the mortgagee making the sale may take such notes in part payment, as they are equivalent to cash, and the taking of them does not prejudice any one.[3] On the contrary, such a course would generally result to the advantage of the owner and of the holders of subsequent liens.[4]

A power of sale given to a mortgagee authorized him, in case of a default in payment of the principal sum and interest, to dispose of the premises by public sale or private contract for such price as could reasonably be obtained for them. Upon default the mortgagee made a private contract of sale. Subsequently, the purchaser not finding it convenient to pay the money down, it was agreed that the larger portion of the purchase money should remain on a mortgage of the estate; and then, instead of conveying the estate to the buyer, the mortgagee conveyed to a trustee, to hold in the first place as security for the payment of the purchase money. It was contended that this was not a good exercise of the power, because the purchase money was not paid down. The amount received was less than the debt due the mortgagee. The court held that the power was duly exercised, and that it was immaterial that the contract of purchase was carried out by mortgage.[5]

The sale is not vitiated by an arrangement made before the sale between the mortgagee and the purchaser whereby the amount of the purchaser's bid is to be applied upon a debt due him from the mortgagee.[6]

1872. When the mortgagee is expressly authorized to sell for cash or on credit, he may do either or combine both in the sale; and although the terms of sale provide for the payment of one third of the purchase money in cash, and the balance in notes secured by mortgage upon the same property, it is competent for

[1] Bailey *v.* Ætna Ins. Co. 10 Allen (Mass.), 286; Davey *v.* Durrant, 1 De G. & J. 535; and see Thurlow *v.* Mackeson, L. R. 4 Q. B. 97; Crenshaw *v.* Seigfried, 24 Gratt. (Va.) 272; Cox *v.* Wheeler, 7 Paige (N. Y.), 248; Parker *v.* Banks, 79 N. C. 480.

[2] Strother *v.* Law, 54 Ill. 413.

[3] Mead *v.* McLaughlin, 42 Mo. 198.

[4] Cox *v.* Wheeler, *supra*.

[5] Thurlow *v.* Mackeson, *supra*.

[6] Tartt *v.* Clayton, 109 Ill. 579.

the mortgagee to change the terms after the property is struck off, by giving credit for a larger portion of the purchase money. Such a power is in this respect without restriction.[1]

In *Markey* v. *Langley*, the mortgagee, being authorized to sell for cash or for credit, sold wholly upon credit, and took property in addition to that covered by the original mortgage as security. On account of a great depreciation in value afterwards, the mortgagee was obliged to sell the property again, and for a less price; and a subsequent incumbrancer then claimed that the mortgagee should be charged with a portion of the nominal proceeds of the first sale as cash, on the ground that he was not justified in selling for credit wholly. But the court held that having authority to sell in this way, and having acted at the time in good faith and for the benefit of all concerned, so far as then appeared, he could not be held responsible for the results.[2]

When a sale is properly made in part for credit, interest continues to run on the part of the mortgage debt not satisfied by the cash payments, until the purchase money is received.[3]

1873. Adjournment. — The power to a trustee or mortgagee to sell by public auction, after a certain public notice of the time and place of sale, includes the power to adjourn the sale, in the exercise of a sound discretion, in order to obtain a fair price for the property. He may adjourn it more than once.[4] Without such power the property might be sacrificed to the injury not only of the creditor but of the debtor as well. As has already been seen, this power of adjournment is held to belong to sheriffs and other public officers selling under judgment or decree of court.[5] "If such a power," says Mr. Justice Curtis, "is implied where the law, acting *in invitum*, selects the officer, *à fortiori* it may be presumed to be granted to a trustee selected by the parties."[6]

It is well settled that a mortgagee may, in the exercise of a reasonable discretion, adjourn the sale from time to time.[7] It is his duty, growing out of the trust relation he occupies towards the mortgagor and all parties interested under him, to get the best price he can, and to take proper and reasonable means to ob-

[1] Markey *v.* Langley, 92 U. S. 142.

[2] Markey *v.* Langley, *supra.*

[3] Stanford *v.* Andrews, 12 Heisk. (Tenn.) 664.

[4] Richards *v.* Holmes, 18 How. 143.

[5] See chapter XXXVI; Warren *v.* Leland, 9 Mass. 265; Russell *v.* Richards, 11 Me. 371; Tinkom *v.* Purdy, 5 Johns. (N. Y.) 345; Bennett *v.* Brundage, 8 Minn. 432.

[6] Richards *v.* Holmes, *supra.*

[7] Richards *v.* Holmes, *supra;* Dexter *v.* Shepard, 117 Mass. 480; Hosmer *v.* Sargent, 8 Allen (Mass.), 97.

tain the full value of the property. If he deems it expedient to adjourn the sale for the reason that very few persons are present, he has the right to do so. He must act in good faith. It often becomes in this way the duty of the mortgagee, or of a trustee under a deed of trust, to adjourn the sale.[1] The want of bidders renders an adjournment necessary. If a trustee finds that there is no bidder except the creditor, or only sham bidders, he should adjourn the sale.[2]

A sale at which no one is present but the auctioneer, who bids off the property for the mortgagee, is void. It is not a legal auction.[3] If the purchaser to whom the property is struck off at the auction refuses to complete his purchase, and the hour of sale has passed and the bidders have departed, a resale cannot be made without advertising the property anew.[4]

When an adjournment is made, it is usual for the officer to announce to those in attendance at the sale the time and place to which the sale is adjourned. The time announced in this way and that afterwards published should agree, or the validity of the sale may be affected.[5]

1874. The notice of an adjournment of a sale, if given at all, need not be so minute and specific as the original advertisement.[6] The adjourned sale is in effect the sale of which the previous notice was published. If the notice of the adjourned sale by mistake fixes a different and more distant day for the sale than that to which the adjournment was actually made, and the sale is actually made upon the day specified in such notice, it will be irregular and void.[7] Whether publication of the adjournment is necessary depends upon the circumstances of the case, and particularly upon the length of time for which the adjournment is made. But it would seem that the omission to advertise the adjournment, in any case of an adjournment for a reasonable time, would not avoid the sale.[8]

[1] Fairfax *v.* Hopkins, 2 Cranch, 134; Vail *v.* Jacobs, 62 Mo. 130, 133; Johnston *v.* Eason, 3 Ired. Eq. 330, 336; Meyer *v.* Jefferson Ins. Co. 5 Mo. App. 245; Thompson *v.* Heywood, 129 Mass. 401; Briggs *v.* Briggs, 135 Mass. 306.

[2] Fairfax *v.* Hopkins, *supra.*

[3] Campbell *v.* Swan, 48 Barb. (N. Y.) 109.

[4] Barnard *v.* Duncan, 38 Mo. 170; Dover *v.* Kennerly, 38 Mo. 469.

[5] Miller *v* Hull, 4 Den. (N. Y.) 104; Jackson *v.* Clark, 7 Johns. (N. Y.) 217.

[6] Dexter *v.* Shepard, 117 Mass. 480.

[7] Miller *v.* Hull, 4 Den. (N. Y.) 104.

[8] Hosmer *v.* Sargent, 8 Allen (Mass.), 97; Stearns *v.* Welsh, 7 Hun (N. Y.), 676; Allen *v.* Cole, 9 N. J. Eq. (1 Stockt.) 286; Coxe *v.* Halsted, 2 Ib. (1 Gr.) 311. The last three cases relate to foreclosure sales in equity.

The adjournment should be announced at the time and place appointed for the sale; and the time and place of the adjourned sale should be stated. It may be made without the agency of a licensed auctioneer.

In Illinois it is held that a trustee in a deed of trust may adjourn the sale in his discretion; but when he does so, he must give a new notice for the same length of time required in the first instance.[1] In some states it is provided by statute that notice of the adjournment shall be given in the same paper in which the original notice was published, and by posting also.[2]

But generally a sale under a power may be adjourned to a future day without giving a new notice for the length of time required for the first notice.[3] After a postponement of a sale has been publicly announced, the mortgagee cannot disregard it, and proceed to sell at the time fixed in the original notice. This would enable the mortgagee to mislead the mortgagor, and would confuse persons wishing to purchase as to the time of sale.[4]

1875. There is no obligation to delay sale to a more favorable time. If a mortgagee sells openly and fairly, and in compliance with the terms of the power, it cannot be objected that he might have obtained a greater price by waiting until a more favorable time. No such obligation is imposed by the mortgage.[5] In a case before the Court of Appeal in Chancery, in relation to a sale by private contract, Lord Justice Knight Bruce said: "It may be that, by speculating and waiting a long time, a larger sum would thereafter have been obtainable had the sale not taken place as it did. But Mr. Durrant (the mortgagee) was not bound to speculate or wait, and was justified in accepting Mr. Packe's price, which was, I repeat, in my opinion, a reasonable and fair price."[6]

[1] Griffin *v.* Marine Co. of Chicago, 52 Ill. 130; Thornton *v.* Boyden, 31 Ill. 200.

[2] See Statutory Provisions for **Michigan**: § **1741**.

Minnesota: § **1743**. See Sanborn *v.* Pettes, 35 Minn. 449, for a case of insufficient advertisement of an adjournment.

New York: § **1751**.

Wisconsin: § **1762**.

[3] Jackson *v.* Clark, 7 Johns. (N. Y.) 217; Dana *v.* Farrington, 4 Minn. 433; Bennett *v.* Brundage, 8 Minn. 432; Sayles *v.* Smith, 12 Wend. (N. Y.) 57; Westgate *v.* Handlin, 7 How. (N. Y.) Pr. 372.

[4] Jackson *v.* Clark, *supra.* The postponement was published under the original notice as follows: "Note, the sale of the above property is postponed to Wednesday, the 3d day of September next."

[5] Franklin *v.* Greene, 2 Allen (Mass.), 519.

[6] Davey *v.* Durrant, 1 De G. & J. 535.

XI. *Who may purchase at Sale under Power.*

1876. The mortgagee is not usually allowed to purchase. Being regarded as in some respects a trustee of the property mortgaged, as a rule he cannot himself become a purchaser at the sale, either directly or indirectly through another person, unless this right be given him by the terms of the power.[1] He is bound to exercise entire good faith; and if, without express authority given him so to do, he becomes the purchaser at the sale, he is subject to the rule which applies generally to a trustee and prohibits his purchasing the trust property.[2]

If the mortgagee or trustee, when not authorized, purchases at the sale, the mortgagor or any other person interested under him may disaffirm the sale, provided he acts within a reasonable time.[3] Such a sale is voidable only, and cannot be treated in a suit at law as absolutely void, unless actual fraud be shown;[4] and, being good till it is set aside, will support an action of ejectment.[5] The sale can be disaffirmed only in a court of equity.[6] A beneficiary under the trust, or a mortgagee who becomes a purchaser, is regarded only as a mortgagee in possession in consequence of the sale and conveyance; but is entitled to be treated as the owner

[1] Downes *v.* Grazebrook, 3 Mer. 200; *In re* Bloye's Trust, 1 Mac. & G. 488; Lockett *v.* Hill, 1 Woods, 552; Griffin *v.* Marine Co. of Chicago, 52 Ill. 130; Waite *v.* Dennison, 51 Ill. 319; Phares *v.* Barbour, 49 Ill. 370; Roberts *v.* Fleming, 53 Ill. 196; Ross *v.* Demoss, 45 Ill. 447; Hall *v.* Towne, 45 Ill. 493; Watson *v.* Sherman, 84 Ill. 263; Ezzell *v.* Watson, 83 Ala. 120; 3 So. Rep. 309; Garland *v.* Watson, 74 Ala. 323; McLean *v.* Presley, 56 Ala. 211; Howell *v.* Pool, 92 N. C. 450; Thomas *v.* Jones (Ala.), 4 So. Rep. 270.

[2] Michoud *v.* Girod, 4 How. 503; Parmenter *v.* Walker, 9 R. I. 225; Korns *v.* Shaffer, 27 Md. 83; Howard *v.* Ames, 3 Met. (Mass.) 308; Hyndman *v.* Hyndman, 19 Vt. 9; Benham *v.* Rowe, 2 Cal. 387; Rutherford *v.* Williams, 42 Mo. 18; Whitehead *v.* Hellen, 76 N. C. 99; Korncgay *v.* Spicer, 76 N. C. 95; Robinson *v.* Amateur Asso. 14 S. C. 148.

[3] Munn *v.* Burges, 70 Ill. 604; Farrar *v.* Payne, 73 Ill. 82; Johnson *v.* Watson, 87 Ill. 535; Thornton *v.* Irwin, 43 Mo. 153; Allen *v.* Ranson, 44 Mo. 263; McLean *v.* Presley, *supra;* Harris *v.* Miller, 71 Ala. 26; Adams *v.* Sayre, 70 Ala. 318; Downs *v.* Hopkins, 65 Ala. 508; Thomas *v.* Jones (Ala.), 4 So. Rep. 270; Dozier *v.* Mitchell, Ib. 511; Ezzell *v.* Watson, *supra;* Garland *v.* Watson, *supra;* Helm *v.* Yerder, 61 Miss. 44; Dawkins *v.* Patterson, 87 N. C. 384; Joyner *v.* Farmer, 78 N. C. 196.

As to reasonable time, see § 1922.

[4] Patten *v.* Pearson, 57 Me. 428; Burns *v.* Thayer, 115 Mass. 89; Mulvey *v.* Gibbons, 87 Ill. 367; Gibbons *v.* Hoag, 95 Ill. 45; Connolly *v.* Hammond, 51 Tex. 635; Jenkins *v.* Pierce, 98 Ill. 646; Ezzell *v.* Watson, *supra;* Harris *v.* Miller, *supra.*

[5] Hawkins *v.* Hudson, 45 Ala. 482 See Whitehead *v.* Hellen, *supra,* a wrong decision.

[6] Harris *v.* Miller, *supra.*

of the property until it is redeemed.[1] If the mortgagor does not claim his right to avoid such a sale, the mortgagee may himself come into equity, to have the uncertainty of his title removed by a confirmation of the sale, or by a resale under order of court.[2] But if the mortgagee, after indirectly becoming the purchaser, sells a portion of the premises to one who has no notice of any defect in the proceedings, the mortgagee cannot have the sale set aside as against such purchaser.[3]

The pledgee of a mortgage, upon selling the property under a power of sale in satisfaction of the pledgor's debt, cannot become the purchaser at the sale. In reference to the pledge and the pledgor he occupies a fiduciary relation, and is in the position of a trustee whose duty it is to exercise his right of sale for the benefit of the pledgor.[4]

Where the notes have been transferred by the payee to a firm of which he is a member, all the members of the firm are equally prohibited from purchasing at the sale.[5] But a mortgagee may purchase an outstanding title, or the equity of redemption, either from the mortgagor or from his grantee, and hold the title absolutely in his own right. He may purchase under a judgment of prior date to the mortgage.[6] But if the purchase be aided by the mortgagor, or he be fraudulently prevented by the mortgagee from purchasing himself, and the mortgagee has taken advantage of his position, he will hold the title acquired for the benefit of the mortgagor as his trustee.[7]

The mortgagee may also purchase from the mortgagor, unless the mortgagee uses his position to obtain the equity of redemption at an inadequate price.[8] As between mortgagee and mortgagor there is nothing analogous to a trust until the whole mortgage debt has been paid and satisfied; from which moment, and not until then, the mortgagee becomes a trustee for the mortgagor.[9]

When a third person has in good faith purchased at the mortgage sale, the mortgagee may purchase of him. His trust is

[1] Goldsmith *v.* Osborne, 1 Edw. (N. Y.) Ch. 560, 562; Rutherford *v.* Williams, 42 Mo. 18.

[2] McLean *v.* Presley, 56 Ala. 211; Harris *v.* Miller, 71 Ala. 26.

[3] Gibbons *v.* Hoag, 95 Ill. 45.

[4] Callan *v.* Wilson, 8 Sup. Ct. Rep. 1301, per Matthews, J.

[5] Mapps *v.* Sharpe, 32 Ill. 13.

[6] Roberts *v.* Fleming, 53 Ill. 196; Harrison *v.* Roberts, 6 Fla. 711; Walthall *v.* Rives, 34 Ala. 91.

[7] Griffin *v.* Marine Co. of Chicago, 52 Ill. 130.

[8] Ford *v.* Olden, L. R. 3 Eq. 461; *S. C.* 36 L. J. C. 651.

[9] Per Wood, V. C., in Kirkwood *v.* Thompson, 2 Hem. & M. 392.

ended with the sale.[1] But if there was a previous arrangement between him and the purchaser for a reconveyance, the trust may still attach to him, and the title he has acquired will be voidable.[2] The presumption is in favor of the mortgagee that he has fulfilled his trust until the contrary is shown.

If the mortgagor or the owner of the equity of redemption elects to disaffirm the sale, and brings a bill for this purpose within a reasonable time, he must offer to redeem, or must tender what is due upon the mortgage. A bill which merely asks to have the sale set aside is insufficient.[3]

1877. It is not necessary in order to avoid the sale to show that there was any actual fraud or unfairness in the transaction, when a mortgagee has violated the principle that a trustee can never be a purchaser. There might be fraud or unfairness, and yet this could not be proved. To guard against this uncertainty, and to place the trustee beyond the reach of temptation, the law allows the *cestui que trust* to set aside such a sale at his option without showing that he has been in any way injured. A mortgage with a power of sale confers a trust coupled with an interest, but the rule applies with the same force as in the case of a naked trust. Without the agreement or consent of the mortgagor he can acquire no title by a purchase, directly or indirectly, at his own sale under the power.[4]

1878. The rule applies equally to the mortgagee's solicitor. If the power of sale does not give to the mortgagee any right to purchase, his solicitor or agent is, equally with himself, disabled from becoming the purchaser of the property either for himself or for another. The mortgagee in such case occupies a fiduciary relation to others, and his solicitor who conducts the sale stands in the same position he does as regards a purchase of the property.[5]

[1] Watson *v.* Sherman, 84 Ill. 263. See § 1880.

[2] Munn *v.* Burges, 70 Ill. 604; Bush *v.* Sherman, 80 Ill. 160; Hoit *v.* Russell, 56 N. H. 559; Whitehead *v.* Hellen, 76 N. C. 99.

[3] Garland *v.* Watson, 74 Ala. 323.

[4] Thornton *v.* Irwin, 43 Mo. 153; Rutherford *v.* Williams, 42 Mo. 18; Blockley *v.* Fowler, 21 Cal. 326.

[5] "Perhaps he is upon principle the individual of all others disabled," said Lord Eldon, in *Ex parte* Bennett, 10 Ves. 381, 385. "As to the solicitor," says the same judge, *Ex parte* James, 8 Ves. 337, 346, "if there is any utility in applying the principle against the assignee, the application as against the solicitor is more loudly called for." See, also, on the general subject, Orme *v.* Wright, 3 Jur. 19; York Buildings Co. *v.* Mackenzie, 8 Brown Parl. Cas. App. 42; Downes *v.* Grazebrook, 3 Mer. 200, 209; Fox *v.* Mackreth, 2 Bro. C. C. 400; Whitcomb *v.* Minchin, 5 Madd. 91; Gardner *v.* Ogden, 22 N. Y. 327; Campbell *v.* Swan, 48 Barb. (N. Y.) 109.

He is bound by the same obligations to secure the best possible results, regardless of the interest of all other persons, except the mortgagor and mortgagee. Neither can he act for a third party having a different interest, in nowise identical with the interest of those for whom he is first bound to act. By reason of his relations to the mortgagee he is bound to get the highest price; and if he act for another person in buying, he is bound to obtain the property at as low a price as he can. These characters are utterly inconsistent, and the policy of the law does not allow them to be united in the same person.[1] Even the employment by a purchaser of a clerk of the mortgagee's solicitor to bid for him at the sale is sufficient to invalidate it.[2]

1879. Mortgagee's agent. — Doubts were at first expressed whether one who has acted as the agent of the mortgagee in surveying the property, advancing the money, and receiving the interest, is a competent purchaser under the power; but on appeal the Chancellor expressly held that he could not purchase.[3] For stronger reasons, one who has acted for the mortgagee in advertising the property and in making the sale cannot properly purchase at the sale.[4] But like a purchase by a mortgagee, a purchase by his agent is voidable only and not void.[5]

When, however, the mortgagee is authorized by the deed to purchase at the sale, he may properly arrange beforehand with a third person to bid a sum not less than the amount of the mortgage and the incidental expenses, as such an arrangement has no tendency to prevent competition at the sale, or to depreciate the price, but on the contrary makes it certain that the sale will at least pay the mortgage debt.[6]

Whether a person authorized by a mortgagee to sell a mortgaged estate under a power of sale has authority to purchase the estate for the mortgagee, where there is no express written authority for this purpose and the testimony is conflicting, is a question of fact for the jury.[7]

1880. Under the same rule, a trustee in a deed of trust

[1] Dyer *v.* Shurtleff, 112 Mass. 165.

[2] Parnell *v.* Tyler, 2 L. J. Ch. N. S. 195.

[3] Orme *v.* Wright, 3 Jur. 19; *S. C.* Ib. 972.

[4] Hoit *v.* Russell, 56 N. H. 559.

[5] Adams *v.* Sayre, 76 Ala. 509; Gibson *v.* Barber (N. C.), 6 S. E. Rep. 766.

[6] Dexter *v.* Shepard, 117 Mass. 480. The purchaser in such case, after taking a deed in his own name, holds in trust for the mortgage creditor. Byrnes *v.* Morris, 53 Tex. 213.

[7] Hood *v.* Adams, 128 Mass. 207.

cannot buy for his own benefit at the trust sale.[1] But the mere fact that the trustee, after a sale by him to a third person, purchased the premises of him, does not vitiate the original sale.[2] "Whether culpable or commendable depends upon the circumstances of each case. It may be wrong, and it may be right. It may be approved by the parties interested and affirmed. It may be condemned by them and avoided. When it is found that the transaction is itself fair and honest, that the purchase was not contemplated at the original sale, but was first thought of years afterwards, and was then made for a full and fair consideration actually paid by the trustee, and after the fiduciary duty was at an end, we find no authority to justify us in pronouncing the original sale to have been fraudulent."[3] If a trustee buys in a prior mortgage he will hold it for the benefit of his *cestui que trust*, upon being reimbursed the amount he has fairly paid for it.[4]

But the objections to a purchase by a trustee at his own sale do not apply so as to prevent a purchase by a beneficiary under the trust deed.[5] The legal title is in the trustee, and the duty of exercising the power of sale fairly rests upon him, and not upon the creditor secured. "The relation of a creditor secured by such deed of trust to a sale made under a power to a stranger as trustee, does not differ from that of a mortgagee of real estate sold under judicial proceedings for foreclosure by a decree of a court of equity."[6]

1881. Perhaps there is less strictness in applying the rule to the case of a mortgagee purchasing at his own sale under the power than there is in the case of a trustee purchasing. The mortgagee, in such case, is not merely a trustee, but he is also a *cestui que trust*, and if he were not allowed to become a purchaser under any circumstances his security might become greatly impaired.[7] Accordingly it has been held that where such a purchase is made with the knowledge and consent of the mortgagor,

[1] Lass *v.* Sternberg, 50 Mo. 124; Stephen *v.* Beall, 22 Wall. 329, 340.

[2] Stephen *v.* Beall, *supra*.

[3] Mr. Justice Hunt, in Stephen *v.* Beall, *supra*. See § 1876.

[4] Crutchfield *v.* Haynes, 14 Ala. 49; Gunter *v.* Janes, 9 Cal. 643.

[5] Easton *v.* German-American Bank, 8 Sup. Ct. Rep. 1297.

[6] Easton *v.* German-American Bank, *supra*, per Matthews, J.

In **Missouri** it is provided by statute that if the property is bought by the *cestui que trust* or his assignee, or by any other person for him, the grantor may redeem, provided he gives security for the payment of the interest to accrue after the sale, and for all damages and waste that may be occasioned. R. S. §§ 3298, 3299; Johnson *v.* Atchinson, 90 Mo. 48.

[7] In Bergen *v.* Bennett, 1 Caines (N. Y.) Cas. 1, 19, Judge Kent said: "It has

in the absence of all suspicion of fraud, it is good and valid.[1] At any rate the mortgagor would not be allowed to avoid the sale after waiting several years.[2] The purchase being made with the mortgagor's consent is the same thing in effect as a conveyance of the equity by the mortgagor to the mortgagee at private sale.

When the creditor or his agent buys at a trustee's sale no objection to the sale can be taken because the purchase money is not actually paid to the trustee. It would be an idle ceremony to pay over the money and immediately receive it back again.[3]

1882. When the sale is made by judicial process there is usually no restraint upon the purchase of the property by the mortgage creditor.[4] The sale is in such case made by a sheriff or other officer appointed by the court or designated by law, and the creditor is not himself the seller. The case is just the same as that of a sale upon an ordinary execution at which the judgment creditor has full liberty to buy.[5] And so also in those states in which there are statutes which regulate all sales under powers in mortgages, prescribing in detail the notices that must be given, and specifically providing for the conduct of the sale, which is made by a public officer, there is not the same objection to the mortgagee's becoming the purchaser, and therefore these statutes generally provide also that the mortgagee may fairly and in good faith purchase the whole or any part of the property.[6]

The mortgagee may purchase at a sale under a power that runs to himself, if the sale is made in good faith, by the sheriff, in accordance with the statute;[7] but not if his own agent acts as auctioneer and makes the certificate and affidavit of sale.[8]

Under a trust deed, when the sale is made by a disinterested trustee, the beneficiary may ordinarily purchase. The holder of

also been made a question, whether the rule would apply to the case of a trustee who was himself a *cestui que trust*, and was obliged to purchase, in order to avoid a loss to himself by a sale at a less price." But he forbore to express any opinion whether the distinction was well taken or not. See, also, Hyde *v.* Warren, 46 Miss. 13, 29.

[1] Dobson *v.* Racey, 8 N. Y. 216.

[2] Medsker *v.* Swaney, 45 Mo. 273; Bergen *v.* Bennett, 1 Caines (N. Y.) Cas. 1, 19.

[3] Weld *v.* Rees, 48 Ill. 428; and see Jacobs *v.* Turpin, 83 Ill. 424; Beal *v.* Blair, 33 Iowa, 318.

[4] As in **Maryland**: § **1740**.

[5] Stratford *v.* Twynam, Jac. 418.

[6] As in **New York**: § **1751**.

Michigan: § **1741**.

Wisconsin: § **1762**; Maxwell *v.* Newton, 65 Wis. 261.

Illinois: § **1733**.

Minnesota: § **1743**.

Rhode Island: § **1756**.

[7] Ramsey *v.* Merriam, 6 Minn. 168.

[8] Allen *v.* Chatfield, 8 Minn. 435.

a note secured by a trust deed may buy at the sale. He may leave a bid with the auctioneer, and the purchase under it will be valid if it is the highest that can be obtained;[1] but if there is any unfairness on his part, such as a representation at the sale that the mortgagor would have a right to redeem from the sale within twelve months, when there was no such right of redemption, and the property in consequence brought only about half its value, it will be held that the sale may be avoided.[2]

In Missouri, however, it is held that where the mortgage provides for a sale by the mortgagee, or, in case of his refusal to act, by the marshal, they are for the purposes of the sale co-trustees, and the mortgagee cannot, by refusing to make the sale, relieve himself of his disability to purchase at the sale by the marshal.[3]

In New York the mortgagee by statute is allowed to purchase at the sale;[4] but independently of the statute, it was there held that he had a perfect right to purchase at his own sale.[5] He is not there regarded as occupying a fiduciary relation to the mortgagor. The foreclosure and sale, when the mortgagee becomes the purchaser, is as complete a bar of the equity of redemption as when any one else becomes the purchaser.[6] An agent may bid for him at the sale without disclosing the fact of the agency; and this is no fraud on other bidders, as he has a right to buy, and would be bound to take the property if struck off to him.[7]

In Mississippi the court in a recent case cited cases in which this right was said to be recognized, but gave no opinion upon it.[8]

In Texas it is held that the mortgagee may purchase at his own sale upon a power, if there be no unfairness in it. It is declared to be for the interest of the mortgagor that the mortgagee should enter into competition at the sale. The sale being open, and made after proper publication of notice, should not be impeached though made to the mortgagee.[9] His deed as trustee to himself as purchaser passes the legal title.[10]

[1] Richards *v.* Holmes, 18 How. 143; Smith *v.* Black, 115 U. S. 308.

[2] Bloom *v.* Van Rensselaer, 15 Ill. 503.

[3] Gaines *v.* Allen, 58 Mo. 537.

[4] 3 R. S. 6th ed. 847, § 7.

[5] Elliott *v.* Wood, 53 Barb. (N. Y.) 285; affirmed, 45 N. Y. 71; Hubbell *v.* Sibley, 5 Lans. (N. Y.) 51; Bergen *v.* Bennett, 1 Caines (N. Y.) Cas. 1; Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48.

[6] Lansing *v.* Goelet, 9 Cow. (N. Y.) 346.

[7] National Fire Ins. Co. *v.* Loomis, 11 Paige (N. Y.), 431.

[8] Hyde *v.* Warren, 46 Miss. 13.

[9] Howards *v.* Davis, 6 Tex. 174; Connolly *v.* Hammond, 51 Tex. 635.

[10] Marsh *v.* Hubbard, 50 Tex. 203.

1883. A provision in express terms that the mortgagee may purchase is usually found in the mortgage deed where power of sale mortgages are in general use, and there is no statute authorizing the mortgagee to purchase at his sale under the power. It has sometimes been declared that this privilege should be strictly construed and should not be favored;[1] but it is generally held that under such a provision the court will not interfere with a purchase by the mortgagee unless there be some other objection which would generally invalidate a purchase by any one else under the same circumstances.[2] The right of the mortgagee to purchase under such a provision is fully sustained by the courts. Lord Eldon clearly intimates that under such authority a trustee might become a purchaser of the trust property;[3] and a mortgagee is not a mere trustee, but has interests of his own to protect.[4]

If the mortgagee avails himself of his right to purchase under a provision in the power giving him this privilege, he will be held by a court of equity to the strictest good faith and the utmost diligence in the execution of the power for the protection of the

[1] Munn *v.* Burges, 79 Ill. 604; Griffin *v.* Marine Co. of Chicago, 52 Ill. 130.

[2] Elliott *v.* Wood, 45 N. Y. 71; Montgomery *v.* Dawes, 12 Allen (Mass.), 397; and see Davey *v.* Durrant, 1 De G. & J. 535; Robinson *v.* Amateur Asso. 14 S. C. 148; Kennedy *v.* Dunn, 58 Cal. 339.

[3] Downes *v.* Grazebrook, 3 Mer. 200. He says: "A trustee for sale is bound to bring the estate to the hammer under every possible advantage to his *cestui que trust.* He may, if he pleases, retire from being a trustee, and divest himself of that character, in order to qualify himself to become a purchaser; and so he may purchase, not indeed from himself as trustee, but under a specific contract with his *cestui que trust.* But, while he continues to be a trustee, he cannot, without the express authority of his *cestui que trust,* have anything to do with the trust property as a purchaser." In Elliott *v.* Wood, *supra,* Mr. Justice Allen said: "Powers of sale are construed liberally for the purpose of effecting the general object, and neither the interest of the mortgagee nor mortgagor will be advanced by forbidding purchase by the mortgagee. The security of the mortgagee would be less valuable, and the mortgagor would lose the benefit of the competition of the mortgagee upon the sale." In the case of Griffin *v.* Marine Co. of Chicago, *supra,* it was said that the clause, conferring upon the mortgagee the right to purchase at his own sale, is subject to a strict construction, and to be regarded with disfavor by the courts. It is conceived that this is an erroneous view of the subject, whatever may be thought of the correctness of the decision of the case before the court. The mortgage there authorized the mortgagee "to become purchaser at said sale, or any member or members of the firm of H. A. Tucker & Co. may become a purchaser at such sale, provided his or her bid for said property, or any portion thereof." It was held that the right to purchase was intended to be upon conditions not fully expressed, and the language not being intelligible the clause should be disregarded entirely, and, therefore, that the mortgagee had no power to purchase.

[4] Waters *v.* Groom, 11 Cl. & Fin. 684.

rights of the mortgagor, and his failure in either particular will give occasion to allow the mortgagor to redeem.[1]

1884. This rule has no application to a subsequent mortgagee who buys at a sale under a prior mortgage, although under his own security he holds the position of a trustee to sell, and is debarred from purchasing at a sale under his own power.[2] This decision of the Master of the Rolls, in the leading case of *Shaw* v. *Bunny*, was affirmed by the Court of Appeals in Chancery,[3] where Lord Justice Knight Bruce said: "There being, I think, not any special circumstance in the present instance to prejudice or affect the purchaser's right, his title against the mortgagor to the benefit of the purchase seems to me, also, as absolute as that of a mere stranger purchasing would have been. I consider, I repeat, in accordance with the view of the Master of the Rolls, that there was nothing to preclude the second mortgagee from buying in the circumstances in which he bought, and retaining his purchase. If, indeed, he had availed himself of his position as a mortgagee to procure some facility or advantage leading to the purchase, or connected with it, that might have made a difference. But I see no such case. It seems to me immaterial that the purchaser would not (if he would not) have been informed of the intended sale had he not been a mortgagee."

But if the second incumbrancer is not merely a mortgagee, but holds the equity of redemption in trust for third persons for sale on default in the payment of the debt, he is incapacitated

[1] Montague *v.* Dawes, 14 Allen (Mass.), 369.

[2] Shaw *v.* Bunny, 33 Beav. 494; *S. C.* 2 De G., J. & S. 468; Kirkwood *v.* Thompson, 2 Hem. & M. 392; *S. C.* 11 Jur. N. S. 385; 2 De G., J. & S. 613; Parkinson *v.* Hanbury, 2 De G., J. & S. 450.

[3] Shaw *v.* Bunny, 13 W. R. 374; *S. C.* 2 De G., J. & S. 468. The sale in this case was not by auction but private. Lord Justice Turner, who also sat in this case, expressed some doubt as to the view taken by his associate and by the Master of the Rolls; but as remarked by Lord Chancellor Cranworth, in Kirkwood *v.* Thompson, 2 De G., J. & S. 613, the authority of the decision is in no way affected thereby. The Lord Chancellor moreover approved the decision, and supported it by strong arguments. After showing that a mortgagee can purchase from his mortgagor he said: "The next step is, can he purchase under a power of sale executed by a first mortgagee?

"It seems to me to follow as a necessary corollary, because the sale that is made under the power of sale by a first mortgagee is substantially a sale by the mortgagor, for it is a sale made under an authority given by the mortgagor paramount to the title of the second mortgagee. It seems to me, that on the principle of the case there is no difference whatever between a purchase from a first mortgagee under a power of sale and a purchase from the mortgagor himself."

from purchasing at a sale by the first mortgagee. He is in such case a trustee.[1]

The circumstances, however, that the second mortgage is in the form of a conveyance in trust to sell, and out of the proceeds to pay the debt secured to the grantee and all other incumbrances, and pay over the surplus to the mortgagor, does not prevent his purchasing under the prior mortgage.[2] "As between the mortgagor, the person conveying, and the person to whom it was conveyed in trust to sell, it certainly was a mortgage as far as he was concerned. He took possession, and he taking possession would be liable to account as mortgagee. It cannot be contradicted that between the parties conveying and the parties to whom it was conveyed, it certainly was a mortgage. It is possible — I do not say whether that would be so — that there might have been different duties as between him and the mortgagor if he had sold, than would have existed in the case of a simple mortgage. But what took place is something that comes in paramount and prior to the exercise of the duties as trustee; he never can sell, because persons having a paramount title to his title choose to exercise that right, and therefore prevent the possibility of his exercising his right, which is a trust only to arise if it was ever in his power to sell, which it was not, in consequence of the sale made by the prior mortgagees."[3]

It is, moreover, immaterial that the second mortgagee is in possession at the time of this purchase under the power in the first mortgage. His possession creates no new obligation except to account. Otherwise his relation as mortgagee remains the same as if he had not been in possession.[4] The fact of his possession does not prevent his purchasing the equity of redemption on an execution sale had upon a judgment in favor of a third person.[5]

1885. The right to avoid such a sale is waived by delay. When a mortgagee purchases at a sale under a power in a mortgage, which does not give him the right to purchase, the equitable owner may set it aside and recover the property, or he may at his election affirm it and have the price obtained applied to

[1] Parkinson *v.* Hanbury, 2 De G., J. & S. 450; Van Epps *v.* Van Epps, 9 Paige (N. Y.), 237; Bell *v.* Webb, 2 Gill (Md.), 163; Boyd *v.* Hawkins, 2 Ired. (Eq.) N. C. 304; Taylor *v.* Heggie, 83 N. C. 244.

[2] Kirkwood *v.* Thompson, 2 De G., J. & S. 613.

[3] Per Lord Chancellor Cranworth in Kirkwood *v.* Thompson, *supra.*

[4] Kirkwood *v.* Thompson, *supra.*

[5] Ten Eyck *v.* Craig, 62 N. Y. 406.

the mortgage debt, and receive the surplus if there be any. But this right to avoid the sale will be treated as waived unless asserted within a reasonable time.[1] What delay will be regarded as a waiver of this right depends upon the circumstances of the case; there can, of course, be no fixed rule. After a lapse of thirteen years, during which no payment of interest or principal had been made or offered by any one on account of the mortgage debt, the owner of the equity of redemption was not allowed to redeem, though he was not notified of the sale and had no actual knowledge of it.[2]

1886. If the title acquired by a mortgagee in this way has passed into the hands of a bona fide purchaser without notice, and for an adequate consideration, the sale cannot afterwards be impeached.[3] Such a sale being voidable only, and not void, the title passes to the nominal purchaser, and any proceedings to set aside the sale, to be effectual, must be commenced before he conveys to another who purchases in good faith.

1887. A mortgagor may purchase at a sale under his own mortgage; but if he has given a subsequent mortgage upon the same property, his purchase will not defeat this; but will operate for the benefit of it in the same way as a discharge, or a transfer of the mortgage to himself.[4] He cannot set up against his own incumbrance another one which he has himself created. Whether the mortgagor would stand in any better position as regards the subsequent incumbrancer, if, instead of purchasing directly under the power, the estate had been sold under the power to a stranger and subsequently purchased from such stranger by the mortgagor, is a question raised but not decided in the case last cited. And in like manner if a purchaser of an equity of redemption subject to two mortgages, both of which he assumed the payment of,

[1] Nichols *v.* Baxter, 5 R. I. 491; Munn *v.* Burges, 70 Ill. 604; Joyner *v.* Farmer, 78 N. C. 196; Taylor *v.* Heggie, 83 N. C. 244.

[2] Learned *v.* Foster, 117 Mass. 365.

[3] Dexter *v.* Shepard, 117 Mass. 480; Burns *v.* Thayer, 115 Mass. 89; Benham *v.* Rowe, 2 Cal. 387; Blockley *v.* Fowler, 21 Cal. 326; Rutherford *v.* Williams, 42 Mo. 18; Robinson *v.* Cullom, 41 Ala. 693; Thurston *v.* Prentiss, 1 Mich. 193; Niles *v.* Ransford, 1 Mich. 338.

[4] Otter *v.* Vaux, 6 De G., M. & G. 638. This principle, that a mortgagor cannot set up an after-acquired title against his own incumbrancer, has been carried to the extent of holding that a mortgagee, purchasing the equity of redemption, could not set up his own mortgage against a subsequent mortgage made by the same mortgagor. But in Toulmin *v.* Steere, 3 Mer. 210, the correctness of this proposition has been questioned, and cannot now be regarded as law. Otter *v.* Vaux, *supra.*

afterwards purchases at a foreclosure sale under the senior mortgage, he cannot set up the title acquired by such last purchase as against the junior mortgage, but his purchase will be considered a payment of the prior mortgage.[1]

A subsequent purchaser of an undivided half of the mortgaged premises may purchase them at a sale under the power. His relations to the mortgagor are not of such a confidential nature as to prevent his buying.[2]

A director of a corporation may purchase at a foreclosure sale property of the corporation mortgaged by vote of the directors, provided good faith be shown.[3]

1888. The wife of the mortgagor may become a purchaser under the power of sale, and hold the estate as her sole and separate property, when the conveyance is made to her in the name of the mortgagee, and not as attorney of the mortgagor. The technical objection, that a husband cannot directly convey to his wife, does not apply.[4] It would seem on principle that it would make no difference as to the wife's right to purchase whether the husband had before the sale parted with his equity of redemption, though in the case cited he had already conveyed his interest; for the mortgagee had the legal title, and he could without doubt assign his mortgage to the mortgagor's wife. It is different from the case of a purchase of an equity of redemption on execution by the wife of the judgment debtor. The sheriff has no title and exercises only a statute power; and the husband has a right to redeem, which he could not enforce by suit against his wife. Such a sale, if it could be made, would operate as a conveyance of the husband's title directly from him to his wife.[5]

XII. *The Deed and Title.*

1889. The holder of legal title should make the deed under the power of sale. The assignee has the same authority in this

[1] Hilton *v.* Bissell, 1 Sandf. (N. Y.) Ch. 407; Tompkins *v.* Halstead, 21 Wis. 118; Stiger *v.* Mahone, 24 N. J. Eq. 426; Plum *v.* Studebaker Bros. Manuf. Co. 89 Mo. 162. But in the latter case it was held that where land incumbered by two trust deeds given by a married woman to secure debts of a third person was sold under the first deed, and bought in by the beneficiary, who subsequently conveyed the property to the grantor, she acquired the land freed from the second deed of trust, and could convey a good title.

[2] Burr *v.* Mueller, 65 Ill. 258.

[3] Saltmarsh *v.* Spaulding (Mass.), 17 N. E. Rep. 316.

[4] Field *v.* Gooding, 106 Mass. 310; Gantz *v.* Toles, 40 Mich. 725.

[5] Stetson *v.* O'Sullivan, 8 Allen (Mass.), 321.

respect that the mortgagee himself had if the power is expressly given to his assigns.[1] Upon the death of the assignee his executor or administrator may execute the power, though it be only to the mortgagee, "his heirs, executors, administrators, or assigns."[2] Under a statute providing for a sale under the power by a sheriff or other officer, such officer stands in the place of the mortgagee in exercising the power of sale; he executes the deed to the purchaser by virtue of the power. The provision of statute has the same effect as if made part of the mortgage deed.[3]

So, also, a trustee selling under a deed of trust conveys the title and estate that was vested in him by the trust deed. He is not required to enter into any personal covenants himself against general incumbrances, though he usually covenants against such as are done or suffered by himself. The purchaser is bound to know that there can be no personal warranty of title. He is also bound to take notice of the title as it stands in the trustee with all its defects as it appears of record.[4] The deed of a trustee after the grantor has conveyed his equity of redemption, which recites that the trustee conveys all the right, title, and estate of the grantor in the property, is sufficient to pass the title and cut off the equity of redemption.[5]

A trustee can make but one sale and deed, and if he attempts to make a second deed the grantee will take no title.[6]

The power to execute a conveyance under a sale by virtue of a power of sale will be inferred as a necessary incident though not expressed in the power of sale.[7]

The deed should recite the power by virtue of which the sale is made, though perhaps such a recital is not necessary as a matter of law.[8] If the deed be made by an attorney of the mortgagee, his authority should be evidenced by a writing under seal, although the power of sale expressly authorizes the mortgagee, his legal representatives or attorney, to convey. But a deed executed by an attorney not so authorized may be regarded as conveying to the purchaser an equitable interest in the premises,

[1] Heath *v.* Hall, 60 Ill. 344.

[2] Saloway *v.* Strawbridge, 1 Jur. N. S. 1194; *S. C.* 7 De G., M. & G. 594; 1 K. & J. 371.

[3] Hoffman *v.* Harrington, 33 Mich. 392.

[4] Barnard *v.* Duncan, 38 Mo. 170.

[5] Tyler *v.* Mass. Mut. Ins. Co. 108 Ill. 58.

[6] Koester *v.* Burke, 81 Ill. 436.

[7] Hunter *v.* Wooldert, 55 Tex. 433; Williams *v.* Otey, 8 Humph. (Tenn.) 563, 568; Fogarty *v.* Sawyer, 17 Cal. 589, 592; Valentine *v.* Piper, 22 Pick. (Mass.) 433.

[8] Smith *v.* Henning, 10 W. Va. 596.

which he may set up in bar of a suit in equity to have the sale set aside.[1]

If a mortgage be taken by one in his capacity as administrator when he had no right to hold real estate in that capacity, upon a sale by him under a power, the deed should be executed by him in his own right and character.[2]

1890. If the mortgagee be a married woman she may execute the power of sale in her own name, and it is not necessary for her husband to join in the conveyance or consent thereto in writing, as is provided by statute in case of a conveyance of her own real property.[3]

1891. When the power authorizes the donee to execute a deed in the name of the mortgagor, or as his attorney, it must be so executed; and the deed of sale will then be the deed of the donor of the power and not of the donee.[4] In such case, if the deed be in the name of the mortgagee, although it may not convey a good title in fee simple at law, it will pass an equitable title to the grantee.[5] And a court of equity may aid the defective execution of the deed, and establish the legal title to the land.[6] But the power was formerly and is now more frequently given to be exercised by the donee, and in such case the deed of sale must be executed in the name of the donee of the power.[7] It is often the case that the power is given in the alternative, and then the deed of sale may be executed in either form, or in both forms. When the power is "to make, execute, and deliver to the purchaser or purchasers thereof all necessary conveyances, for the purpose of vesting in such purchaser or purchasers the premises so sold in fee simple absolute," it may be executed by the deed of the mortgagee in his own name; though it might, perhaps, be executed by him as the attorney of the mortgagor.[8]

An administrator who has taken a power of sale mortgage, in which he is described as administrator, should execute a deed under the power contained in the mortgage in his own name, right, and character, and not as administrator, as he does not hold the land in that character, and cannot exercise the power in that capacity.[9]

[1] Watson *v.* Sherman, 84 Ill. 263.
[2] Wilkerson *v.* Allen, 67 Mo. 502.
[3] Cranston *v.* Crane, 97 Mass. 459.
[4] Speer *v.* Hadduck, 31 Ill. 439.
[5] Mulvey *v.* Gibbons, 87 Ill. 367.
[6] Gibbons *v.* Hoag, 95 Ill. 45.
[7] Munn *v.* Burges, 70 Ill. 604.
[8] Cranston *v.* Crane, *supra.*
[9] Wilkerson *v.* Allen, *supra.*

1892. A mortgagee purchasing may make a deed to himself. The courts have, in some instances, intimated that upon a sale under a power in a mortgage, the mortgagee, although authorized by the terms of the power to become a purchaser at the sale, cannot make the deed directly to himself, but must convey to a third person.[1] But in a recent case in Massachusetts it was decided that under a mortgage which provided that the mortgagee might purchase at the sale, and that the deed to the purchaser might be made by the mortgagee, either as the attorney of the mortgagor or in his own name, a deed executed in both forms to himself directly was valid.[2] From the principles on which the decision is based it would seem that the court would have held that the mortgagee might have made the deed in his own name directly to himself, and that the validity of it did not depend upon the execution of it to himself in the name of the mortgagor.

1893. In New York by statute no deed is necessary when the mortgagee himself becomes the purchaser, and it is said that under the statutes as they now stand no deed is necessary in any

[1] Dexter *v.* Shepard, 117 Mass. 480; Jackson *v.* Colden, 4 Cow. (N. Y.) 266.

[2] Hall *v.* Bliss, 118 Mass. 554. "Such a mortgage," says Gray, Ch. J., "vests a seisin and a conditional estate in the mortgagee, with a power superadded to convey an absolute estate by a sale pursuant to the terms of the power. The execution of the power does but change, in accordance with the terms of the mortgage deed, the uses upon which the estate is to be held. The purchaser at the sale takes not as the grantee of the mortgagee, but as the person designated or appointed by the mortgagee in execution of the power, and derives his title from the mortgagor, as if the designation or appointment had been inserted in the original deed, and the seisin or interest to serve the estate is raised by that deed. . . . The decision in Field *v.* Gooding, 106 Mass. 310, that, upon a sale under a power in a mortgage, the wife of the mortgagor might be the purchaser, and have the estate conveyed to her, is in nowise inconsistent with this view. The fact that the husband had previously sold the equity of redemption relieved that case from the difficulties which might have existed if he had owned it at the time of the sale. See Tucker *v.* Fenno, 110 Mass. 311. The intervention of the mortgagee as donee of the power removed the technical objection that the husband could not convey directly to his wife. The suggestions in Dexter *v.* Shepard, *supra*, and in Jackson *v.* Colden, *supra*, that, upon a sale under the power in a mortgage, the deed could not be made by the mortgagee to himself, were by way of argument only, and not of adjudication; for in Dexter *v.* Shepard the purchase and conveyance were made through a third person; and in Jackson *v.* Colden the court held that, under a statute containing provisions similar to those of this mortgage, no deed was necessary when the mortgagee became the purchaser at the sale; and although the counsel on both sides, and the other judges, assumed that it would be impossible to make such a deed, Chief Justice Savage implied that, if any deed was necessary, a deed from the mortgagee to himself would be valid." And see Hood *v.* Adams, 124 Mass. 481. The case of Hall *v.* Bliss was approved and followed in Woonsocket Inst. Sav. *v.* Am. Worsted Co. 13 R. I. 255.

case to perfect the title in the purchaser.[1] The affidavits in such case have the force and effect of a deed.[2] Until they are made, no title vests in the purchaser. The mortgagee, in such case, in order to maintain ejectment upon his title, must show that all the requirements of the statute have been complied with and the affidavits completed before the commencement of the action.[3] Unless it appears by the affidavits on file that the notice was served on the mortgagor, the sale will not give any title to the purchaser.[4]

In Alabama it seems, also, that a deed is not necessary to vest the title in the mortgagee who has become a purchaser at a sale under a trust deed. At any rate, after such a sale and long acquiescence in it, the mortgagee or his grantee is entitled to a decree vesting in him whatever legal estate remained in the mortgagor.[5]

1894. After a sale under a power the title as a general rule remains unaffected until a deed is executed and delivered by the mortgagee to the purchaser. The auction sale does not vest the title in the purchaser.[6] Upon the delivery of the deed the purchaser is entitled to the possession of the property, and he may maintain a writ of entry or an action of ejectment to recover it.[7] He need not give the mortgagor or other occupant of the premises notice to quit before bringing suit to recover possession of the premises, though the mortgage provides that the mortgagor may retain possession until a sale is made. Notice to quit is necessary only where the relation of landlord and tenant exists.[8] In New York, where no deed is necessary to the passing of the title, the foreclosure has sometimes been said to be complete, so far as to bar the equity of redemption, as soon as the sale is made;[9] though according to some authorities the right of possession remains in the mortgagor till the affidavits are made and recorded;[10] and until this be done

[1] Thomas on Mort. 420.

[2] See § 1660; Jackson *v.* Colden, 4 Cow. (N. Y.) 266.

[3] Tuthill *v.* Tracy, 31 N. Y. 157; Layman *v.* Whiting, 20 Barb. (N. Y.) 559; Bryan *v.* Butts, 27 Ib. 503; Howard *v.* Hatch, 29 Ib. 297.

[4] Dwight *v.* Phillips, 48 Barb. (N. Y.) 116.

[5] Brunson *v.* Morgan, 4 So. Rep. 589.

[6] Tripp *v.* Ide, 3 R. I. 51. See § **1653**, for delivery of deed under judicial sales.

[7] Lydston *v.* Powell, 101 Mass. 77; Cranston *v.* Crane, 97 Mass. 459.

[8] Waters *v.* Butler, 4 Cranch C. C. 371.

[9] Tuthill *v.* Tracy, 31 N. Y. 157; Mowry *v.* Sanborn, 7 Hun (N. Y.), 380; *S. C.* 68 N. Y. 153.

[10] Arnot *v.* McClure, 4 Den. (N. Y.) 41; Layman *v* Whiting, *supra.*

there is no transfer of title sufficient to authorize an action of ejectment by the purchaser. The recorded affidavits operate as a statutory transfer of title.[1] In Massachusetts and New York, moreover, the purchaser, instead of being obliged to resort to an action of ejectment to enforce his right of possession of the mortgaged premises, may now recover possession by the summary process used in landlord and tenant cases.[2]

1895. The deed is not evidence of recitals in it. A deed made in pursuance of a power of sale by the mortgagee, trustee, or sheriff is by itself, in a suit in equity, no evidence of a regular foreclosure of a mortgage.[3] It is sometimes provided in deeds of trust that the recitals contained in the trustee's deed of sale under the power shall be *primâ facie* evidence of the facts stated in it. But in the absence of such a provision the recitals are either regarded in equity as affording no evidence of their truth,[4] or as being at most *primâ facie* evidence of the facts they recite.[5]

In an action at law, however, a trustee's deed made under a power in a trust deed, is conclusive evidence of the sale under the power, and cannot be contradicted, and shown to have been executed in violation of law, and therefore fraudulent and void.[6]

The deed made in pursuance of the power usually refers to the power, and recites the substance of it; but this is not absolutely essential, if it is otherwise manifest that the intention of the mortgagee was to execute the power. If such intention is not manifest, a simple deed by the mortgagee will be held to convey only his mortgage interest subject to redemption.[7] A deed which represents the sale as one made in bulk for a single bid is not a proper one where the sale was in fact in separate parcels and for several bids.[8]

1896. The deed may be made to a person other than the purchaser by his consent and direction. It is often the case that the bidder at the sale transfers his bid to another, and directs the

[1] Mowry *v.* Sanborn, 7 Hun (N. Y.), 380; *S. C.* 68 N. Y. 153.

[2] § 1741; Laws of N. Y. 1874, ch. 208.

[3] Barman *v.* Carhartt, 10 Mich. 338; Hebert *v.* Bulte, 42 Mich. 489; Wood *v.* Lake, 62 Ala. 489.

[4] Vail *v.* Jacobs, 62 Mo. 130; Neilson *v.* Chariton Co. 60 Mo. 386; Carter *v.* Abshire, 48 Mo. 300; Hancock *v.* Whybark, 66 Mo. 672.

[5] Ingle *v.* Jones, 43 Iowa, 286; Beal *v.* Blair, 33 Iowa, 318.

[6] § 1830; Winbelt *v.* Hurlbut, 115 Ill. 403; Fulton *v.* Johnson, 24 W. Va. 95, 108; Dryden *v.* Stephens, 19 W. Va. 1; Lallance *v.* Fisher (W. Va.), 2 S. E. Rep. 775; Savings and Loan Soc. *v.* Deering, 66 Cal. 281.

[7] Pease *v.* Pilot Knob Iron Co. 49 Mo. 124.

[8] Grover *v.* Fox, 36 Mich. 461.

deed to be made to such person, and if there be no fraud in the transaction, and no loss to the mortgagee thereby, there can be no objection to the transaction. But even if objection could be urged by an immediate party to the sale, it cannot be set up in an action of ejectment against remote purchasers without any notice of the irregularity to defeat their title.[1] If the purchaser die before the conveyance is executed this does not avoid the sale, but the deed may be made to his executor or administrator in his official capacity upon payment of the purchase money.[2]

1897. The purchaser takes the mortgagor's title divested of all incumbrances made since the creation of the power.[3] "It has been established ever since the time of Lord Coke, that where a power is executed the person taking under it takes under him who created the power, and not under him who executes it."[4] The purchaser takes all the mortgagor's equity of redemption, and all the mortgagee's title under the mortgage.[5] He takes the estate free of a reservation made by the mortgagor to release certain easements belonging to the mortgaged premises. By the exercise of the power of sale, the reserved power is extinguished, and a subsequent release by the mortgagor is void.[6] He takes it free of any claim the mortgagor may make for improvements placed upon the land by him.[7] But he does not take an independent title acquired by the mortgagee, or a right reserved to him as grantor in the original deed to the mortgagor,[8] unless in express terms the entire estate be put up and sold.[9] A sale regularly exercised under a power is equivalent to a strict foreclosure by a court of equity properly pursued,[10] or to a foreclosure and sale under a decree in equity, and cannot be defeated to the prejudice of one purchasing in good faith.[11] The sale is not impaired

[1] Johnson *v.* Watson, 87 Ill. 535; *S. C.* 8 Cent. L. J. 26.

[2] § **1652**; Lewis *v.* Wells, 50 Ala. 198.

[3] §§ **1654, 1853**; Doolittle *v.* Lewis, 7 Johns. (N. Y.) Ch. 45; Bancroft *v.* Ashhurst, 2 Grant (Pa.) Cas. 513; Sims *v.* Field, 66 Mo. 111.

[4] Lord Tenterden, C. J., in Wigan *v.* Jones, 10 B. & C. 459.

[5] Hall *v.* Bliss, 118 Mass. 554; Torrey *v.* Cook, 116 Mass. 163; Brown *v.* Smith, 116 Mass. 108; Aiken *v.* Bridgeford (Ala.), 4 So. Rep. 266; Powers *v.* Andrews, Ib. 263.

[6] Bull's Petition (R. I.), 10 Atl. Rep. 484; Savings Inst. *v.* Worsted Co. 13 R. I. 255.

[7] Neal *v.* Hamilton (Tex.), 7 S. W. Rep. 672.

[8] Walsh *v.* Macomber, 119 Mass. 73.

[9] Skilton *v.* Roberts, 129 Mass. 306.

[10] Aiken *v.* Bridgeford, *supra.*

[11] Jackson *v.* Henry, 10 Johns. (N. Y.) 185; and see Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129, 147; Robinson *v.* Amateur Asso. 14 S. C. 148, 152.

or affected in any way by reason that any person interested in the property is at the time under a legal disability.[1]

The doctrine that a purchaser from a trustee with notice of the trust shall be charged with the same trust, has no application to sales of trust estates at public auction, under the terms of the power contained in the trust deed.[2]

Even if the purchaser under the power omits to record his deed, a subsequent purchaser from the mortgagor has no right of redemption. The record of the mortgage is sufficient to put all persons upon inquiry whether any proceedings have been had under the power of sale.[3]

Of course, if the mortgage was void, or if it was originally valid but the remedy upon it had before the sale become barred by the statute of limitations, the purchaser takes no title or interest by the sale.[4]

1898. Bona fide purchaser. — One who purchases at a sale under a power without notice, actual or constructive, of any irregularity in the proceedings, acquires a valid title,[5] although the mortgagor might redeem as against the person making the sale,[6] as where payment of the mortgage debt has been tendered to the holder of the mortgage. Where the power authorizes the mortgagee to become a purchaser, and title is made to him accordingly, a *bonâ fide* purchaser from him without notice is not prejudiced by such irregularity on his part in making the sale.[7] To defeat a sale under the power, the mortgagor should immediately follow up the tender by a suit to redeem; otherwise a third person without notice of any defect in the proceedings, or of any facts that should put him as a reasonable man upon inquiry, may gain a good title, and the mortgagor will then be unable to redeem against him, although he might against the purchaser at the sale.[8] If the purchaser be cognizant of any fraud or unfair dealing in the sale, he acquires no title by it;[9] as where he has agreed with the mortgagee's agent to share the profits of the pur-

[1] Demarest *v.* Wynkoop, 3 Johns. (N. Y.) Ch. 129, 147.

[2] Wood *v.* Augustine, 61 Mo. 46.

[3] Farrar *v.* Payne, 73 Ill. 82; Heaton *v.* Prather, 84 Ill. 330. See § **557**.

[4] Emory *v.* Keighan, 88 Ill. 482.

[5] Jackson *v.* Dominick, 14 Johns. (N. Y.) 435; Jackson *v.* Henry, 10 Johns. (N. Y.) 185; Hosmer *v.* Campbell, 98 Ill. 572; Jenkins *v.* Pierce, 98 Ill. 646; Philips *v.* Bailey, 82 Mo. 639; Carey *v.* Brown, 62 Cal. 373.

[6] Shillaber *v.* Robinson, 97 U. S. 69.

[7] Digby *v.* Jones, 67 Mo. 104.

[8] Montague *v.* Dawes, 12 Allen (Mass.), 397; Hoit *v.* Russell, 56 N. H. 559; Grover *v.* Hale, 107 Ill. 638.

[9] Jackson *v.* Crafts, 18 Johns. (N. Y.) 110; and see Hamilton *v.* Lubukee, 51 Ill. 415.

chase, and he has bought the property at a grossly inadequate price.[1]

Although the mortgage has in fact been paid, if not discharged of record, a sale regularly made under the statute to a *bonâ fide* purchaser is held to be equivalent to a sale under a decree in equity, and is therefore an entire bar, both as against the mortgagor and all persons claiming under him.[2] They can only impeach the sale by showing that the proceedings were not regular and effectual in form. Fraud on the part of the mortgagee or holder of the mortgage will not defeat the title of such purchaser. Usury, or any other matter affecting the validity of the mortgage, will not affect the validity of the title acquired by an innocent purchaser.[3] If the mortgage be void, or if it has been paid, a purchaser with notice acquires no title; but the mortgage appearing of record to be valid, a purchaser without notice does acquire title.[4]

In Minnesota, where a foreclosure sale is not considered complete until the expiration of the year within which redemption may be had, such a sale under a paid-up mortgage confers upon the purchaser a valid title to the property upon the expiration of the year without redemption.[5]

Although a part of the mortgaged premises has been released from the operation of the mortgage, if the release be not recorded, and the part released be sold with the rest to a *bonâ fide* purchaser without notice, he will hold the entire property, the release having no effect as to him.[6]

The sale under a power is equivalent to a foreclosure and sale in equity, and a *bonâ fide* purchaser is protected in the same manner and to the same extent.[7]

1899. The title of one purchasing in good faith under a

[1] Mann *v.* Best, 62 Mo. 491.

[2] Warner *v.* Blakeman, 36 Barb. (N. Y.) 501; *S. C.* 4 Keyes, 487; Merchant *v.* Woods, 27 Minn. 396.

This case substantially overrules the *dicta* of Mr. Justice Cowen, that the purchaser would acquire no title under the sale, the mortgage being void after payment. Cameron *v.* Irwin, 5 Hill (N. Y.), 272.

[3] Elliott *v.* Wood, 53 Barb. (N. Y.) 285; Welsh *v.* Coley (Ala.), 2 So. Rep. 733.

[4] Cameron *v.* Irwin, *supra;* Warner *v.* Blakeman, 36 Barb. (N. Y.) 501; *S. C.* 4 Abb. App. Dec. 530; Penny *v.* Cook, 19 Iowa, 538; Ledyard *v.* Chapin, 6 Ind. 320; Wade *v.* Harper, 3 Yerg. (Tenn.) 383.

[5] Merchant *v.* Woods, *supra.*

[6] Palmer *v.* Bates, 22 Minn. 532.

[7] Jackson *v.* Henry, 10 Johns. (N. Y.) 185; Slee *v.* Manhattan Co. 1 Paige (N. Y.), 48.

power of sale is unaffected by any agreement between the parties to the mortgage that the sale should be deferred in consideration of the payment of the interest due;[1] or that no sale should be made without giving personal notice of it to the mortgagor;[2] or because a tender had been made to the mortgagee before the sale of the amount due, which he had declined.[3] Those who have bought in good faith from the purchaser at the sale are not affected by any irregularities attending it, although these were known to their vendor, or he had been a party to some fraud attending it.[4]

In Illinois, however, it has been held that after the payment of the mortgage debt the mortgage itself is extinguished, and any sale made under a power contained in it is void even as against a *bonâ fide* purchaser. After such a sale, the purchaser being in possession, a court of equity may set aside the sale, and compel a reconveyance of the legal title, in order to remove the cloud.[5] If the legal title passes to the purchaser he will hold as trustee for the debtor; but this defect will not be inquired into at law, nor can the trust be established except in equity.[6]

The fact that by mistake more land is sold by the mortgagee than his mortgage covers does not affect the validity of the sale as to so much of the land as he was entitled to.[7]

Where a statute declares a note tainted by usury to be wholly void, a sale under a power in a mortgage or trust deed securing such note confers no title when the mortgagee or beneficiary becomes the purchaser.[8] The sale would be a conclusive bar only in favor of a *bonâ fide* purchaser without notice, which a party to the usurious contract could not be.

1900. Under the English practice of conveyancing it is generally provided in the mortgage deed that the purchaser shall not be bound to inquire whether any default has been made, or whether any money remains due upon the security, or otherwise as to the propriety or regularity of the sale; and under such a

[1] Beatie *v.* Butler, 21 Mo. 313.

[2] Randall *v.* Hazelton, 12 Allen (Mass.), 412.

[3] Montague *v.* Dawes, 12 Allen (Mass.), 397.

[4] See Hamilton *v.* Lubukee, 51 Ill. 415.

[5] Redmond *v.* Packenham, 66 Ill. 434. And see per Cowen, J, in Cameron *v.* Irwin, 5 Hill (N. Y.), 272; Wood *v.* Colvin, 2 Hill (N. Y.), 566.

[6] § 1921; Chapin *v.* Billings, 91 Ill. 539.

[7] Klock *v.* Cronkhite, 1 Hill (N. Y.), 107.

[8] Penny *v.* Cook, 19 Iowa, 538; Jackson *v.* Dominick, 14 Johns. (N. Y.) 435; Hyland *v.* Stafford, 10 Barb. (N. Y.) 558.

provision the purchaser acquires a good title by a sale made in good faith, even if nothing remains due upon the mortgage.[1]

1901. Covenant for further conveyance. — Sometimes a covenant is inserted in the mortgage that the mortgagor shall in case of a sale under the power make such further conveyance as may be necessary for better effecting it, or will concur or join in the sale. A covenant of this sort is for the benefit of the mortgagee, with whom it is made, and not of the purchaser.[2] As a matter of practical conveyancing, this is an important provision, as it often enables the mortgagee to obtain a release which will bar all inquiry into irregularities attending the sale.

1902. An invalid sale may operate as an assignment of the mortgage.[3] If the sale under the power is subsequently declared void for any irregularity, a purchaser who has paid the purchase money is subrogated to the rights of the mortgagee under the mortgage, which is regarded as assigned to him, and he may proceed anew to foreclose,[4] or to sell under the power.[5] If the purchaser has subsequently sold the property by warranty deed, this amounts to an assignment of the mortgage to such grantee, who of course has the same right to foreclose.[6] Under a deed of trust, the purchaser is subrogated to all the rights of the beneficiary.[7] When the sale was made without notice, the trustee's deed passes to the purchaser the legal title, and, until redemption is had, enables him to maintain possession.[8] And so if the sale be made before a default the trustee's deed confers the legal title in trust for the benefit of the grantor.[9] The trustee, after an informal or ineffectual sale, may reassume his duty as trustee and proceed to make an effectual sale.[10]

A purchaser at an irregular foreclosure sale obtains all the rights

[1] Dicker *v.* Angerstein, 24 W. R. 844.

[2] Clay *v.* Sharpe, 18 Ves. 346; Corder *v.* Morgan, 18 Ves. 344.

[3] Holmes *v.* Turner's Falls Co. 142 Mass. 590; Dearnaley *v.* Chase, 136 Mass. 288; Taylor *v.* A. & M. Asso. 68 Ala. 229; Rogers *v.* Benton (Minn.), 38 N. W. Rep. 765.

[4] **1678**; Brown *v.* Smith, 116 Mass. 108; Burns *v.* Thayer, 115 Mass. 89; Johnson *v.* Robertson, 34 Md. 165; Gilbert *v.* Cooley, Walker (Mich.), 494; Jones *v.* Mack, 53 Mo. 147; Russell *v.* Whitely, 59 Mo. 196; Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212; Robinson *v.* Ryan, 25 N. Y. 320; Clark *v.* Wilson, 56 Miss. 753, 758; State Bank of Bay City *v.* Chapelle, 40 Mich. 447.

[5] Bottineau *v.* Ætna L. Ins. Co. 31 Minn. 125.

[6] Niles *v.* Ransford, 1 Mich. 338; Bottineau *v.* Ætna L. Ins. Co. *supra.*

[7] Ingle *v.* Culbertson, 43 Iowa, 265.

[8] Wilson *v.* South Park Comm'rs, 70 Ill. 46; Wormell *v.* Nason, 83 N. C. 32.

[9] Chicago, Rock Island & Pacific R. R. Co. *v.* Kennedy, 70 Ill. 350; Kœster *v.* Burke, 81 Ill. 436.

[10] Ohnsburg *v.* Turner, 13 Mo. App. 533; affirmed 87 Mo. 127.

of the mortgagee, although the sale and conveyance are not made by the mortgagee himself, but by an officer acting under a statute regulating sales under powers in mortgages. The statute in such case becomes a part of the mortgage, and a sale made in pursuance of it is an exercise of the power conferred by the contract.[1] "The officer who sells merely stands in the shoes of the mortgagee and represents both parties."[2]

When a mortgagee becomes a purchaser at his own sale, and the sale is void, he acquires no rights, either legal or equitable, by means of the sale. The parties after the sale stand as they did before the ineffectual form of sale took place; and all the costs and expenses attending it must be borne by the mortgagee.[3] But the purchaser's rights as mortgagee enable him to sell again under the power, or to foreclose by a proceeding in equity.[4]

A sale made by a person without authority to act for or represent the mortgagee does not, of course, operate as an assignment of the mortgage.[5]

A mortgagee who takes possession of the mortgaged premises under a void sale is liable for the rents and profits received by him upon a subsequent redemption by the mortgagor. But to make him liable he must have had actual possession, or such a possession as would give him the enjoyment of the profits.[6] Such mortgagee would also be liable for waste committed or suffered by him while in actual possession of the premises. But if he is not in possession, and the injury done was not any act of his, or one which he could prevent, as, for instance, a destruction of buildings by the Confederate army, he is not responsible for it.[7]

If a third party who has purchased under an invalid sale enters into possession, and makes valuable improvements upon the property, he is entitled to compensation therefor.[8]

If the mortgage debt has been paid before the sale, the purchaser obtains at most only a bare legal title, which he will hold for the benefit of the owner of the estate; and in states where payment alone, whenever made, is sufficient to revest the title in the mortgagor, the sale would be void.[9]

[1] Hoffman *v.* Harrington, 33 Mich. 392.

[2] Ibid., per Mr. Justice Campbell.

[3] Queen City Perpetual Building Asso. *v.* Price, 53 Md. 397.

[4] Morse *v.* Byam, 55 Mich. 594.

[5] Hayes *v.* Lienlokken, 48 Wis. 509.

[6] Bigler *v.* Waller, 14 Wall. 297.

[7] Bigler *v.* Waller, *supra.*

[8] Queen City Perpetual Building Asso. *v.* Price, 53 Md. 397; Mickles *v.* Dillaye, 17 N. Y. 80; Wetmore *v.* Roberts, 10 How. (N. Y.) Pr. 51; Higinbotham *v.* Benson (Neb.), 39 N. E. Rep. 418.

[9] Furguson *v.* Coward, 12 Heisk. (Tenn.) 572.

The purchaser at the sale may recover possession of the land by an action at law; and it is no defence to such action by the mortgagee that the purchaser reconveyed the land to him, and that the purchaser acted in the purchase as the mortgagee's agent, for the mortgagee is entitled to recover upon the strength of his title as mortgagee.[1]

1903. The remedy against a purchaser who declines to complete a purchase made at a sale regularly conducted may be either by a bill in equity for a specific performance, or a suit at law for damages.[2] If the former remedy be waived, the property should be sold again; and if it brings a less sum, the former purchaser is liable at law for the difference in price, and for the expenses attending the resale.[3] If the purchaser is unable to complete the purchase, being financially worthless, the mortgagee may sell the property again under the power; and, having acted in good faith, and notified a surety on the mortgage note of all the proceedings attending the sales, the mortgagee may recover of him a deficiency after the sale. The mortgagee in such case need not bring a bill for specific performance of the contract of purchase.[4]

It is a sufficient excuse for the purchaser's declining to complete his purchase, that the auctioneer offered the property free of incumbrances, and the purchase was made on that understanding, at the full value of the property, when in fact the property was incumbered by prior mortgages which were not removed before the tendering of a deed.[5] In such case the purchaser is entitled to recover, in an action for money had and received, the amount of a deposit made in accordance with the terms of sale.[6]

But the bidder at the sale is not bound by his bid unless there was a memorandum of sale signed by him, or by the auctioneer acting as the agent of both parties.[7]

[1] Wittkowski *v.* Watkins, 84 N C. 456.

[2] Sherwood *v.* Saxton, 63 Mo. 78, and cases cited. See § **1680**.

[3] Dover *v.* Kennerly, 38 Mo. 469; Gardner *v.* Armstrong, 31 Mo. 535.

[4] Fall River Sav. Bank *v.* Sullivan, 131 Mass. 537; Wing *v.* Hayford, 124 Mass. 249; Hood *v.* Adams, 124 Mass. 481.

[5] Mayer *v.* Adrian, 77 N. C. 83; Callaghan *v.* O'Brien, 136 Mass. 378.

[6] Callaghan *v.* O'Brien, *supra.*

[7] Cook *v.* Hilliard (C. C. Ill. 1881), 9 Fed. Rep. 4. As to necessity of such memorandum, see Burke *v.* Haley, 2 Gilm. (Ill.) 614; Doty *v.* Wilder, 15 Ill. 407.

XIII. *The Affidavit.*

1904. Neglect to make and file an affidavit of sale does not invalidate it. In Massachusetts, where a statute provides that the mortgagee, in case he sells without a decree of court, shall within thirty days after selling the property in pursuance of the power file a copy of the notice and his affidavit, setting forth his acts in the premises fully and particularly, in the registry of deeds,[1] it is held that the sale is good, and the title passes without complying with this provision, which is regarded only as directory, and not precluding other evidence of the execution of the power of sale.[2]

Under a statute requiring an affidavit of the publication of the notice of sale to be made by the printer of the newspaper, an affidavit by one who states that he is the publisher of the paper is sufficient, as the publisher and printer are presumably the same.[3] Neither the affidavit nor its record are necessary to the validity of the purchaser's title. If the affidavit omits to state that the notice was published once in each week, and the paper in which it was published is erroneously stated, the fact that the notice was properly published may be otherwise proved.[4] And if there be no affidavit at all, the publication of the notices and the circumstances of the sale may be proved by common law evidence.[5]

In New York it is also held that the affidavits of publication and affixing notice of sale are sufficient to pass the title without being recorded.[6] The fact of publication may also be shown by proof independent of the affidavit. The making, filing, and re-

[1] G. S. ch. 140, § 42.

[2] Field *v.* Gooding, 106 Mass. 310; Learned *v.* Foster, 117 Mass. 365; Burns *v.* Thayer, 115 Mass. 89. In the first case cited, Mr. Justice Colt said: "The provision is intended to secure the preservation of evidence that the conditions of the power of sale named in the deed have been complied with. It is for the protection of those claiming under the sale, and to prevent litigation. The title passes by the sale and deed, and immediately vests in the purchaser. It was not the intention to make it subject to a condition subsequent, and liable to be defeated by a failure of the mortgagee to perform an act which must follow the conveyance in point of time, and thus add to the conditions prescribed by the mortgagor in the deed."

[3] Menard *v.* Crowe, 20 Minn. 448; Bunce *v.* Reed, 16 Barb. (N. Y.) 347; Sharp *v.* Dangney, 33 Cal. 513.

[4] Golcher *v.* Brisbin, 20 Minn. 453.

[5] Arnot *v.* McClure, 4 Den. (N. Y.) 41; Wilkerson *v.* Allen, 67 Mo. 502.

[6] Tuthill *v.* Tracy, 31 N. Y. 157; Howard *v.* Hatch, 29 Barb. 297; Frink *v.* Thompson, 4 Lans. 489. See Mowry *v.* Sanborn, 68 N. Y. 153, where the history of the legislation on this subject is given.

cording of affidavits provided for by statute are not in the exercise of the power of sale contained in the mortgage, which must be strictly pursued; but they are the mere evidences of the due exercise of such power, prescribed for the benefit of the purchaser under the power, and to perfect his title and perpetuate the evidences of it. The power is fully exercised when the sale has been regularly and duly made pursuant to notice published and served as required by law.[1]

Yet it has been held that if the mortgage provide that an affidavit of the proceedings under the power should be recorded in a certain county within one year, and the affidavit be not made and filed within such time, the sale will be treated as a nullity.[2]

1905. In order that the affidavit may have the force of presumptive evidence of the facts therein stated, it should be made within a reasonable time after the sale. If made seven or eight years after the sale, it is not such evidence.[3] To have the effect of presumptive evidence, moreover, the affidavit must show that the requirements of law in regard to the sale have been complied with; as, for instance, that service of notice has been made in the manner prescribed.[4] Even when the affidavits are presumptive evidence of the facts required to be stated in them, they may be controverted by the mortgagor, or those claiming under him.[5] Where the affidavits may be filed at any time, it would seem that defects in the original affidavits may be corrected by new affidavits.[6] But defects in the affidavits cannot be supplied after the commencement of an action in which they are material for the support of the title. The parties must stand on the affidavits as they were at the time of bringing the suit.[7]

The mortgagee is accountable for the full amount bid at the sale if he completes it by a conveyance, whether he actually receives the purchase money or not. His affidavit need not state

[1] Mowry *v.* Sanborn, 72 N. Y. 534, reversing *S. C.* 11 Hun, 545.

[2] Smith *v.* Provin, 4 Allen (Mass.), 516.

[3] Mundy *v.* Monroe, 1 Mich. 68.

[4] Mowry *v.* Sanborn, 65 N. Y. 581. An affidavit on information and belief is insufficient.

[5] Arnot *v.* McClure, 4 Den. (N. Y.) 41; Sherman *v.* Willett, 42 N. Y. 146; Mowry *v.* Sanborn, 62 Barb. (N. Y.) 223; *S. C.* 7 Hun, 380; 68 N Y. 153; 72 N. Y. 534, reversing *S. C.* 11 Hun, 545; Maxwell *v.* Newton, 65 Wis. 261.

[6] Bunce *v.* Reed, 16 Barb. (N. Y.) 347.

[7] Dwight *v.* Phillips, 48 Barb. (N. Y.) 116; Mowry *v.* Sanborn, 7 Hun (N. Y.), 380; but see *S. C.* 62 Barb. 223; 65 N. Y. 581; 11 Hun, 545; 68 N. Y. 153.

In the last report it was declared that defects in an affidavit of service of notice upon the mortgagor might be supplied by parol evidence.

the rendering of an account or the disposition that has been made of the purchase money.[1] Where the whole estate is sold, the purchase money is properly applicable to the payment of any prior incumbrances upon the property as well as the mortgage under which the sale is made, so far as it will go; and it is only in case the consideration of the sale exceeds the amount of such incumbrances that he is accountable for a surplus. A second or subsequent mortgagee is not estopped by the recital in his affidavit of sale of the amount for which the sale was made, to show that the sale was in fact of the whole estate, and that less than the whole amount of the incumbrances was received.[2]

XIV. *Setting aside and waiving Sale.*

1906. A mortgagee or trustee, in the exercise of a power of sale, must act fairly, and is under very much the same obligation to other parties in interest as a trustee in other cases.[3] So far as other persons are interested in the property the power is regarded as a trust, and the mortgagee is treated as a trustee in the exercise of it. Fairness and good faith are demanded of him.[4] The grounds for setting aside a sale under a power are not merely those which are recognized as sufficient for setting aside a foreclosure sale made under proceedings in equity;[5] but there are also others which arose from the trust relation, in which the mortgagee acts in conducting the proceedings.[6]

[1] Childs *v.* Dolan, 5 Allen (Mass.), 319.

[2] Alden *v.* Wilkins, 117 Mass. 216.

[3] Matthie *v.* Edwards, 2 Coll. 465, 480. "I apprehend," says Vice-Chancellor Bruce, "that a mortgagee having a power of sale cannot, as between him and the mortgagor, exercise it in a manner merely arbitrary, but is, as between them, bound to exercise some discretion; not to throw away the property, but to act in a prudent and business like manner, with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be under the circumstances obtainable." This statement of a general principle is undoubtedly correct, though in the application of it to the case in hand the Vice-Chancellor was subsequently overruled in Jones *v.* Matthie, 11 Jur. 504. In Orme *v.* Wright, 3 Jur. 19, Lord Langdale said: "A trustee should use all the means in his power to get the fairest and best price for the property."

[4] Ellsworth *v.* Lockwood, 42 N. Y. 89; Jencks *v.* Alexander, 11 Paige (N. Y.), 619, 624. See Soule *v.* Ludlow, 3 Hun (N. Y.), 503; *S. C.* 6 T. & C. 24; Longwith *v.* Butler, 8 Ill. (3 Gil.) 32; Weld *v.* Rees, 48 Ill. 428, 437; Waller *v.* Arnold, 71 Ill. 350; Grover *v.* Fox, 36 Mich. 461; Equitable Trust Co. *v.* Fisher, 106 Ill. 189; Chappell's case, 42 Md. 166; Wicks *v.* Westcott, 59 Md. 270; Littell *v.* Grady, 68 Ark. 584; Webber *v.* Curtiss, 104 Ill. 309.

[5] See Leet *v.* McMaster, 51 Barb. (N. Y.) 236; Hubbell *v.* Sibley, 5 Lans. (N. Y.) 51.

[6] The obligations of a mortgagee in the exercise of the power are forcibly declared by Mr. Justice Wells of Massachusetts: "One who undertakes to ex-

But only the mortgagor or some one claiming under him can impeach a sale under the power. It cannot be called in question by a stranger.[1]

A sale will not be set aside because of anything pertaining to the original terms of the mortgage, if they are such that they can be legally enforced. Thus a sale will not be set aside because the terms of the mortgage loan were hard and the interest high.[2]

But a sale made under a mortgage which is void for want of any consideration may be set aside.[3]

A sale will not be set aside simply upon the ground that at the time of the sale the property was incumbered by other mortgage liens and by judgment liens, especially when it appears that there is no uncertainty or controversy as to the amounts and priorities of such liens.[4] But it is incumbent upon the mortgagee or trustee, in announcing at the sale the amount of such prior liens, to see that his statement is approximately accurate, and in nowise misleading.[5]

A sale conducted in entire good faith, and in strict compliance with the terms of the power, will not be set aside merely because the result of the sale is accidentally a hardship upon the mortgagor, but a legitimate result from his contract; thus the court will not set aside such a sale because there was only one bidder at the sale, and the property was sold for less than its value.[6]

1907. Whether a sale is void or voidable only by reason of any irregularity depends upon the nature of the irregularity. The distinction is taken that when a power directs the doing of

ecute a power of sale is bound to the observance of good faith and a suitable regard for the interests of his principal. He cannot shelter himself under a bare literal compliance with the conditions imposed by the terms of the power. He must use a reasonable degree of effort and diligence to secure and protect the interests of the party who intrusts him with the power. A stranger to his proceedings, finding them all correct in form, and purchasing in good faith, may not be affected by his unfaithfulness. But whenever his proceedings can be set aside without injustice to innocent third parties, it will be done upon proof that they have been conducted in disregard of the rights of the donor of the power. When a party who is intrusted with a power to sell attempts, also, to become the purchaser, he will be held to the strictest good faith and the utmost diligence for the protection of the rights of his principal." Montague *v.* Dawes, 14 Allen (Mass.), 369. And see Hood *v.* Adams, 124 Mass. 481; Thompson *v.* Heywood, 129 Mass. 401; Briggs *v.* Briggs, 135 Mass. 306.

[1] Wormell *v.* Nason, 83 N. C. 32.

[2] Robinson *v.* Amateur Asso. 14 S. C. 148.

[3] Walker *v.* Carleton, 97 Ill. 582.

[4] Lallance *v.* Fisher (W. Va.), 2 S. E. Rep. 775.

[5] Wicks *v.* Westcott, 59 Md. 271.

[6] Learned *v.* Geer, 139 Mass. 31.

a specified thing in a particular manner, and there has been a total failure to comply with the direction, the execution of the power is void. Thus a sale without publication of notice in certain newspapers specified in the power was held void.[1] But when the mode and manner of the notice of sale, or of the place of it, is left to the discretion of the trustee, and it appears that there has been an honest though mistaken exercise of his judgment in respect to these matters, the sale is not regarded as absolutely void, but is voidable only at the election of the parties interested.[2] The burden is upon the party who asks a court of equity to set aside a sale, on the ground that it was not duly advertised and properly made, to establish such ground by satisfactory proof.[3]

1908. When the owner of the equity of redemption becomes bankrupt, and foreclosure proceedings are subsequently instituted in a state court against the objection of the assignee, or an attempt is made to foreclose by a sale under a power, the proceedings are void unless made with leave of the bankrupt court.[4] But the fact that a subsequent mortgagee is a bankrupt is no objection to the execution of a power of sale in a prior mortgage.[5]

1909. Allowing property to be sacrificed. — A mortgagee with power to sell, or holding under an absolute conveyance, must sell fairly and for the best price he can obtain. He has no right to sell for a price sufficient to pay his claim without reference to the value of the property. A purchaser who knows that the mortgagee is sacrificing the property for a small fraction of its value is not an innocent purchaser, and will only occupy the position of an assignee of the mortgage debt.[6] If a trustee permits property to be sacrificed by a sale for a small fraction of its value, as where property worth from $5,000 to $8,000 is sold for $1,000, the sale will be set aside on timely application.[7]

[1] Bigler *v.* Waller, 14 Wall. 297.

[2] Ingle *v.* Culbertson, 43 Iowa, 265, 273.

[3] Lallance *v.* Fisher (W. Va.), 2 S. E. Rep. 775. See §§ **1830, 1895**.

[4] Hutchings *v.* Muzzy Iron Works, 6 Chicago L. N. 27; *In re* Brinkman, 7 N. Bank. R. 421; Mackubin *v.* Boarman, 54 Md. 384; §§ **1231–1236**.

[5] Long *v.* Rogers, 6 Biss. 416.

[6] Runkle *v.* Gaylord, 1 Nev. 123. In this case the price obtained was about a third of the value of the estate, and five months' rent of it was sufficient to pay the debt.

[7] Vail *v.* Jacobs, 62 Mo. 130, per Sherwood, J. "Neither the law nor the parties intend that the trustee shall be a nose of wax, a mere figure-head, in the hands of the creditor and of the auctioneer." And see Meath *v.* Porter, 9 Heisk. (Tenn.) 224.

But where property sells for two thirds of its value, and the sale is unattended by fraud, the inadequacy of price does not authorize the setting aside of the sale.[1]

When the notices provided for by the power have been properly given, and there is no fact underlying the formal proceedings showing bad faith on the part of the mortgagee, the mortgagor cannot have relief from the sale, although through his own mistake or negligence he failed to attend the sale or to protect his interest. A court of equity will not open a sale for any such reason.[2]

Not only is the mortgagee's misconduct in conducting the sale a ground for setting the sale aside, but it may be also a ground for an action at law by the mortgagor against the mortgagee for loss sustained by such misconduct. Thus a mortgagor who has conveyed his equity of redemption, and who after a sale under the power is obliged to pay a deficiency, may maintain an action at law against the mortgagee to recover a loss sustained through the misconduct of the latter in so conducting the sale that the mortgagor was obliged to pay a deficiency.[3]

1910. The sale is avoided by a secret arrangement to prevent competition. Every person interested in the equity of redemption has a right to claim that the sale shall be made fairly, and with the advantage of such competition as the sale would ordinarily command. A secret arrangement between the mortgagee and a person interested in buying the property, whereby competition is prevented, avoids the sale; as where by such arrangement the notice of the sale was published in a newspaper which did not circulate in the region where the mortgaged premises were, and the sale was fixed at an unreasonably early hour in the morning, and the sale was persisted in when a due regard to the interest of the debtor required a postponement.[4] On this ground a person claiming under the mortgagor was allowed to redeem after a sale made while an injunction against it was in force, under an arrangement between the mortgagor and the person who procured the injunction that the sale should be made, and that he should bid off the property at a certain price, and the injunction suit should be dismissed.[5] A sale was held fraud-

[1] Weld *v.* Rees, 48 Ill. 428. See Klein *v.* Glass, 53 Tex. 37.

[2] King *v.* Bronson, 122 Mass. 122; Weld *v.* Rees, *supra.*

[3] Fenton *v.* Torrey, 133 Mass. 138.

[4] Thompson *v.* Heywood, 129 Mass. 401.

[5] See Mapps *v.* Sharpe, 32 Ill. 13.

ulent and void where the assignee of the mortgage acting as auctioneer, seeing the owner of the equity approaching, immediately knocked down the property to his own brother in order to prevent competition.[1]

If an agent of the mortgagee acting under the power in making the sale has previously agreed with the purchaser to furnish half of the purchase money and divide the profits, the sale is a fraud upon both the mortgagor and mortgagee.[2]

The burden of proof is upon the party charging fraud and collusion between the buyer and the seller under a power.[3]

1911. Any fraud or deception practised upon the owner of the mortgaged premises, in consequence of which he has lost his rights, is sufficient ground for setting aside the sale.[4] The power of sale in a mortgage is a trust power, so far as it relates to the interest in the property, or in the proceeds of it above the amount due the mortgagee; and any collusive arrangement between the mortgagee and a third person, so to execute the power as to deprive the owner of the equity of redemption of his rights by keeping the knowledge of the sale from him, or by preventing a fair competition at the sale and enabling a purchaser to obtain the premises at a price below their value, will avoid the sale.[5]

If the owner of the land be insane, and the mortgagee knowing the fact buys the property for less than half its value, the sale should be set aside as fraudulent and void; and a purchaser from the mortgagee having the same knowledge has no better right to hold the property than the mortgagee himself.[6]

A sale under a power was set aside where the mortgagee filed a bill in equity to foreclose, making a junior mortgagee a party defendant, and pending this suit, to which the junior mortgagee answered, the first mortgagee sold under the power of sale. The resort to equity to foreclose the mortgage had a tendency to lull

[1] Jackson *v.* Crafts, 18 Johns. (N. Y.) 110.

[2] Mann *v.* Best, 62 Mo. 491.

[3] Bush *v.* Sherman, 80 Ill. 160; Munn *v.* Burges, 70 Ill. 604.

[4] Banta *v.* Maxwell, 12 How. (N. Y.) Pr. 479; Murdock *v.* Empie, 19 Ib. 79; Ferrand *v.* Clay, 1 Jur. 165; Soule *v.* Ludlow, 6 T. & C. (N. Y.) 24; *S. C.* 3 Hun, 503; Leet *v.* McMaster, 51 Barb. (N. Y.) 236; Culbertson *v.* Young, 50 Mich. 190; Equitable Trust Co. *v.* Fisher, 106 Ill. 189; Webber *v.* Curtiss, 104 Ill. 309; Loeber *v.* Herring, 55 Md. 1.

[5] Jencks *v.* Alexander, 11 Paige (N.Y.), 619. In this case, Walworth, Chancellor, said: "It is impossible to wink so hard as not to see that the power of sale was executed in bad faith." Howard *v.* Ames, 3 Met. (Mass.) 308; Norton *v.* Tharp, 53 Mich. 146; Pestel *v.* Primm, 109 Ill. 353.

[6] Encking *v.* Simmons, 28 Wis. 272.

the junior mortgagee into a false security in regard to any sale under the power.[1]

The fact that one of two joint mortgagors, upon the refusal of the other to pay part of an instalment due, refuses to pay his part, and suggests a sale under the power, is no evidence of his fraudulently procuring a foreclosure of the mortgage.[2]

1912. The conduct of the purchaser at the sale may avoid it;[3] as where he expostulates with a rival bidder, informing him of his losses, and telling him that on account of them he ought not to bid against him, and thereby causes the bidder to withdraw, and obtains the land at a price much less than its value, the sale will be invalid as against a subsequent mortgagee who seeks to redeem.[4] A combination by the purchaser with other bidders at the sale, for the purpose of obtaining the property at a price below its value, will also invalidate the sale.[5]

While a purchaser, who is guilty of any fraud, trick, or device, the object of which is to get the property at less than its value, will not be permitted to enjoy the fruits of his purchase so obtained, yet the burden of showing the fraud is upon the person setting it up; and to justify the setting aside of the sale on this ground, the evidence to establish the fraud must be clear and convincing.[6]

1913. If a purchaser buys at a sale under a power with knowledge of circumstances sufficient to invalidate the sale, as that a valid tender has been made of the whole amount due under the mortgage, he thereby becomes a party to the transaction, and is not protected by a proviso that the purchaser need make no inquiries. Such knowledge puts him in the same situation as the mortgagee as to the validity of the sale.[7] He is chargeable with notice of defects and irregularities attending the sale. He is chargeable, too, with knowledge whether proper notice of the sale was given, and whether the sale was made at the time and in the manner required by the power.[8] But the rule is different

[1] Hurd *v.* Case, 32 Ill. 45.

[2] St. Joseph Manufacturing Co. *v.* Daggett, 84 Ill. 556.

[3] Sugden on Vendors, 30.

[4] Fenner *v.* Tucker, 6 R. I. 551.

[5] Dover *v.* Kennerly, 44 Mo. 145, 148.

[6] Forrester *v.* Scoville, 51 Mo. 268; Forrester *v.* Moore, 77 Mo. 651; Jackson *v.* Wood, 88 Mo. 77; Keiser *v.* Gammon, (Mo.) 8 S. W. Rep. 377.

[7] Jenkins *v.* Jones, 2 Gif. 99. See Cranston *v.* Crane, 97 Mass. 459; Chicago, Rock Island & Pacific R. R. Co. *v.* Kennedy, 70 Ill. 350; Grover *v.* Hale, 107 Ill. 638.

[8] Gunnell *v.* Cockerill, 79 Ill. 79.

as regards remote purchasers, who, having no notice in fact of any irregularities, will be protected as innocent purchasers.[1]

1914. Purchase by agent without authority. — A trustee, in whose name a mortgage was taken to secure the payment of the separate claims of several creditors of the mortgagor, has no authority to bind them by a purchase of the property at the foreclosure sale, made in good faith and for the protection and joint benefit of all of them; neither can a majority of such creditors force the others, who object to the purchase, to enter into any arrangement for buying the lands at such sale. A resale of the property will be ordered at the option of the objecting creditors.[2]

Whether an agent of the mortgagee for the sale of the mortgaged property under a power is authorized to purchase for the mortgagee, where no express authority is given, is a question for the jury.[3]

1915. Mere inadequacy of price is no ground for vacating a sale if it was fairly conducted in every respect,[4] unless the inadequacy be so great as to furnish evidence of fraud.[5] And even in a state where the sale must be reported to the court and confirmed, as in case of a foreclosure sale in equity, the inadequacy of price must be very material to prevent a confirmation of it; and such in fact as to furnish evidence of fraud on the part of the trustee. A sale for half the estimated value of the property has been held not to be such inadequacy.[6] This circumstance, however, when taken in connection with others attending the sale, may be considered sufficient in the sound discretion of the court to call for its equitable interposition and the setting aside of the sale.[7] A sale of property worth at least $8,500 for $5,000 was

[1] Gunnell *v.* Cockerill, 79 Ill. 79; McHany *v.* Schenk, 88 Ill. 357.

[2] Bradley *v.* Tyson, 33 Mich. 337.

[3] Hood *v.* Adams, 128 Mass. 207.

[4] King *v.* Bronson, 122 Mass. 122; Wing *v.* Hayford, 124 Mass. 249; Landrum *v.* Union Bank of Mo. 63 Mo. 48; Harnickell *v.* Orndorff, 35 Md. 341; Horsey *v.* Hough, 38 Md. 130; Klein *v.* Glass, 53 Tex. 37; McNair *v.* Pope (N. C.), 6 S. E. Rep. 234; Smith *v.* Black, 115 U. S. 308; Hoodless *v.* Reid, 112 Ill. 105; Maxwell *v.* Newton, 65 Wis. 261; Learned *v.* Geer, 139 Mass. 31; Laclede Bank *v.* Keeler, 109 Ill. 385; Hoyt *v.* Pawtucket Inst. for Savings, 110 Ill. 390; Corrothers *v.* Harris, 23 W. Va. 177; Cleaver *v.* Green, 107 Ill. 67; Dryden *v.* Stephens, 19 W. Va. 1; Mills *v.* Williams, 16 S. C. 593; Kline *v.* Vogel, 11 Mo. App. 211; Vail *v.* Jacobs, 7 Mo. App. 571; Meyer *v.* Knechler, 10 Mo. App. 371; Parmly *v.* Walker, 102 Ill. 617; Kennedy *v.* Dunn, 58 Cal. 339. See § 1670.

[5] Robinson *v.* Amateur Asso. 14 S. C. 148; Jenkins *v.* Pierce, 98 Ill. 646; Loeber *v.* Herring, 55 Md. 1.

[6] Lallance *v.* Fisher (W. Va.), 2 S. E. Rep. 775; Bradford *v.* McConihay, 15 W. Va. 732.

[7] Chilton *v.* Brooks (Md.), 16 Atl. Rep. 273; Hubbard *v.* Jarrell, 23 Md. 66; La-

not regarded such a gross inadequacy of price as to authorize equitable interference; but when it appeared further that the sale was made at an unusual hour, and that only two bidders were present, the sale was set aside, although it was not shown that the property would have brought any greater sum had it been sold at the usual hour of sale.[1]

If the mortgagee, or the beneficiary under a deed of trust, has acquired a tax title, but does not claim to hold this for himself but for the benefit of the property, and afterwards sells under the power for a greatly inadequate price, bidding being prevented by the fact that he holds the tax title, the sale will be set aside.[2]

The owner of land sold under a power of sale, who attends the sale and bids upon the property, and allows it to be sold to another, will not be permitted years afterwards, when improvements have been made upon it, to impeach the sale on account of inadequacy of price.[3]

A sale by a trustee under a trust deed will not be set aside because the premises were sold for only one third their value, the purchaser being a stranger to the transaction, and having in good faith sold the premises to another; nor because the property was sold in parcels and not together;[4] nor because the trustee requested a bidder to advance his bid;[5] nor because the trustee should have adjourned the sale in view of the small attendance and inadequate price bid.[6] But if the trustee at the time of the sale had knowledge that the creditor was willing to pay five times the amount bid at the sale, he abuses his discretion by striking the property off at such bid, and the sale will be set aside.[7] Objection to the validity of the sale comes too late when third persons, acting in good faith, have acquired rights.[8]

Where by statute a time is allowed for redemption under a sale, mere inadequacy of price does not vitiate the sale, because the owner of the equity of redemption cannot be prejudiced, inasmuch as he may always redeem within such time by refunding the amount paid with interest, according to the statute. It is only his failure to do this that can occasion him any loss.[9]

lor *v.* M'Carthy, 24 Minn. 417; Keiser *v.* Gammon (Mo.), 8 S. W. Rep. 377.

[1] Stoffel *v.* Schroeder, 62 Mo. 147.

[2] Martin *v.* Swofford, 59 Miss. 328.

[3] Watson *v.* Sherman, 84 Ill. 263.

[4] Sternberg *v.* Valentine, 6 Mo. App. 176.

[5] Swenson *v.* Halberg (C. C. Minn. 1880), 1 Fed. Rep. 444.

[6] Shine *v* Hill, 23 Iowa, 264.

[7] Meyer *v.* Jefferson Ins. Co. 5 Mo. App. 245.

[8] Shine *v.* Hill, *supra.*

[9] Cameron *v.* Adams, 31 Mich. 426.

1916. Sale waived by extending time of redemption. — If a mortgagee who has purchased the premises at a foreclosure sale during the year allowed for redemption agrees with the mortgagor to extend the time of payment beyond the year, and in accordance with the agreement accepts money from the mortgagor, the sale is thereby rendered ineffectual; and the mortgagee cannot afterwards rely upon the sale and record the sheriff's deed as being of any force.[1] But if part payments are made and received after the sale, with the understanding that the whole sum necessary for that purpose is to be paid within the year allowed by statute, they do not avoid the sale but are in affirmance of it.[2]

A foreclosure may be opened when the purchaser has agreed with the mortgagor to allow him to redeem the estate after a sale under the power; or a specific performance of the agreement may be decreed.[3]

1917. A promise to allow the mortgagor to repurchase does not waive the sale. A casual remark by a purchaser under a deed of trust, who was also the beneficiary under it, and connected with the family of the maker of it, that he only wished by the purchase to secure his debt, and when that was paid he intended to reconvey the property, does not open the sale or make the purchaser a trustee of the property.[4] Nor would the promise of a mortgagee, made at the time of his purchase at his own sale under the power, that he would allow the mortgagor to repurchase, without other evidence of such intention, remit them to their former relation, so that the mortgagor could redeem after waiting several years; but the mortgagee's refusal to allow such redemption within a reasonable time might be evidence of such fraud in the purchase by the mortgagee as to admit the mortgagor to his right of redemption.[5]

1918. A suit for a second instalment does not open foreclosure. When a mortgage is foreclosed for an instalment due, and a subsequent suit is brought to recover a second instalment, such suit does not open the foreclosure. In this case the foreclosure was made by taking possession of the premises instead of selling them; and the mortgagor is entitled to a credit on the debt of the value of the mortgaged property.[6]

[1] Dodge *v.* Brewer, 31 Mich. 227.

[2] Cameron *v.* Adams, 31 Mich. 426.

[3] Orme *v.* Wright, 3 Jur. 19; Lockwood *v.* Mitchell, 7 Ohio St. 387.

[4] Mansur *v.* Willard, 57 Mo. 347.

[5] Medsker *v.* Swaney, 45 Mo. 273.

[6] Wilson *v.* Wilson, 4 Iowa, 309.

1919. Not waived by subsequent entry to foreclose. — A foreclosure sale under a power, voidable by reason of the mortgagee's becoming the purchaser, is not waived or opened by the mortgagee's subsequently entering in the presence of two witnesses, in accordance with the statute, for the purpose of foreclosure, provided there be no evidence showing an intention to waive or abandon the rights acquired by the sale.[1]

1920. Waiver by agreement. — After an ineffectual attempt to foreclose under a power of sale, if the purchaser waives his rights the mortgagee may also waive the sale, and proceed anew to foreclose under the power, or by suit in equity.[2] But if the sale be regular and complete in all respects, it would seem that the mortgagor might insist upon its standing. At any rate when the sale is for a sum sufficient to pay the mortgage debt and expenses, although the mortgagee be himself the purchaser at the sale, he cannot, by refusing to execute the deed, rescind the sale, and maintain an action upon the mortgage note.[3] He is bound as a trustee to execute the trust with a due regard to the interests of the mortgagor, or others having any interest in the property, or liable for the mortgage debt. Having himself become the purchaser, he is bound to carry out and complete his purchase to the same extent as any other purchaser. The proper performance of his duty as purchaser is as imperative upon him as the proper performance of his duty as seller. The fact that he unites the two characters in his own person cannot give him any additional rights; on the contrary, he is held to a stricter accountability when he undertakes to buy.[4]

A foreclosure is waived by accepting after the sale a payment of money to be applied on the mortgage debt.[5] So, also, the bringing of a suit for the whole amount of the mortgage debt, and obtaining a judgment therefor, opens the foreclosure sale and lets in the equity of redemption.[6]

1921. Relief by setting aside the sale must be sought in equity.[7] The purchaser at the sale and all persons claiming under him are necessary parties.[8] The sale passes the legal title to the

[1] Learned *v.* Foster, 117 Mass. 365.

[2] See § **1265**; Atwater *v.* Kinman, Har. (Mich.) 243.

[3] Hood *v.* Adams, 124 Mass. 481.

[4] Per Endicott, J., in Hood *v.* Adams, *supra.*

[5] Scott *v.* Childs (N. H.), 15 Atl. Rep. 206.

[6] Clarke *v.* Robinson (R. I.), 10 Atl. Rep. 642.

[7] Yale *v.* Stevenson, 38 Mich. 537.

[8] Candee *v.* Burke, 1 Hun (N. Y.), 546; *S. C.* 4 T. & C. 143; Fairman *v.* Peck, 87 Ill. 156.

purchaser, and a court of law will not inquire whether the mortgagee or trustee has complied with the conditions of the mortgage or deed of trust.[1]

If the sale has not been completed by the payment of the purchase money the mortgagee should be made a party. After the completion of the sale by a conveyance from the mortgagee to the purchaser, the latter will as assignee hold the rights of the mortgagee even if the sale be set aside.[2] The setting aside of the sale does not affect or impair the original mortgage lien.[3] If one who has received any part of the surplus money brings an action to set aside the sale, he will be required to refund the money he has received before the sale will be disturbed.[4]

In a few cases it has been said that the remedy of one who, having an interest in the equity of redemption, wishes to test the validity of a sale under a power, is by a bill to redeem, and not by a bill to set aside the sale and have the property resold; and this is the remedy although it be shown that the mortgagee has used his power of sale inequitably, and has unfairly bought in the property himself.[5] If the foreclosure sale be void for any irregularity, the right of redemption remains unchanged in the mortgagor.[6]

Redemption ordinarily involves a tender of the mortgage debt.[7] But sales have been set aside in many cases without an offer to redeem. When the sale is fraudulent in fact, and therefore void, a court of equity will not refuse relief because the debtor cannot fulfil an impossible condition of tendering the amount of the mortgage debt. The mortgage debtor has a right to insist that the power of sale shall be exercised in strict accordance with law, and that there shall be no abuse of the trust; and of this right he should not be deprived merely because he is unable to redeem. Under such circumstances, where the debt exceeds the value of the property, the assignee of the bankrupt mortgagor may maintain proceedings to set aside the sale without offering to redeem.[8]

[1] Reece *v.* Allen, 5 Gilm. (Ill.) 236; Graham *v.* Anderson, 42 Ill. 514, 517; Dawson *v.* Hayden, 67 Ill. 52; Rice *v.* Brown, 77 Ill. 549; Chapin *v.* Billings, 91 Ill. 539.

[2] Robinson *v.* Ryan, 25 N. Y. 320; Jackson *v.* Bowen, 7 Cow. (N. Y.) 13; Vroom *v.* Ditmas, 4 Paige (N. Y.), 526.

[3] Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212.

[4] Candee *v.* Burke, 1 Hun (N. Y.), 546; *S. C.* 4 T. & C. 143.

[5] Schwarz *v.* Sears, Walk. (Mich.) 170; Tuthill *v.* Lupton, 1 Edw. (N. Y.) 564. The authority of these cases has been doubted. Meyer *v.* Jefferson Ins. Co. 5 Mo. App. 245.

[6] Goldsmith *v.* Osborne, 1 Edw. (N. Y.) 560.

[7] Kline *v.* Vogel, 11 Mo. App. 211.

[8] Meyer *v.* Jefferson Ins. Co. *supra.*

Pending a bill to set aside a sale on account of fraud participated in by the purchaser, the latter may be restrained by injunction from committing waste upon the property.[1] The bill should contain a clear allegation of the defect for which it is sought to set aside the sale.[2]

1922. Delay. — Where no steps had been taken to redeem a mortgage for nearly forty years after its maturity, and more than thirty years after an open attempt to foreclose it, it was said that it would require a very strong showing to authorize a redemption.[3] So a delay of four or five years precludes a mortgagor's redeeming as against subsequent purchasers in good faith.[4] Acquiescence for any considerable time in a sale which is voidable only, unless explained, is deemed a waiver of all mere irregularities attending it; and ignorance of the facts which are claimed as vitiating the sale is not a sufficient explanation of such acquiescence, when such ignorance is the fault or negligence of the party.[5] It is not permissible for the owner of the equity of redemption to lie by and await events, and have the power at any future time to let the sale stand or to avoid it, according as it may be found to be for his interest to do. He must promptly avail himself of any irregularities in the sale within a reasonable time.[6]

But the mortgagor is not required to bring an action to set aside such unauthorized sale before the expiration of the year for redemption.[7]

Moreover, if the mortgagor receives the surplus money, although he may not be estopped from questioning the validity of the sale,

[1] Thompson *v.* Heywood, 129 Mass. 401.

[2] Sawyer *v.* Bradshaw (Ill.), 17 N. E. Rep. 812.

[3] Hoffman *v.* Harrington, 33 Mich. 392. See § **1674**.

[4] Hamilton *v.* Lubukee, 51 Ill. 415; Gibbons *v.* Hoag, 95 Ill. 45; Ryan *v.* Kales (Ariz.), 20 Pac. Rep. 311; Hoyt *v.* Pawtucket Inst. for Savings, 110 Ill. 390; Cleaver *v.* Green, 107 Ill. 67. A delay of eight months may not be unreasonable. Walker *v.* Carleton, 97 Ill. 582; McHany *v.* Schenk, 88 Ill. 357.

[5] Bush *v.* Sherman, 80 Ill. 160; Farrar *v.* Payne, 73 Ill. 82; Caudle *v.* Murphy, 89 Ill. 352; Watson *v.* Sherman, 84 Ill. 263; Landrum *v.* Union Bank of Mo. 63 Mo. 48; Connolly *v.* Hammond, 51 Tex. 635; Jenkins *v.* Pierce, 98 Ill. 646; Sloan *v.* Frothingham, 65 Ala. 593; Abbott *v.* Peck, 35 Minn. 499; 29 N. W. Rep. 194; Askew *v.* Sanders (Ala.), 4 So. Rep. 167; Norton *v.* Tharp, 53 Mich. 146; Welsh *v.* Coley (Ala.), 2 So. Rep. 733.

In **Alabama** the later decisions have inclined to fix two years as a reasonable time, by way of analogy to the time fixed by statute for the redemption of realty sold under mortgages. This limitation is *primâ facie* applicable, but may be shown to be unreasonably short. Ezzel *v.* Watson, 3 So. Rep. 309.

[6] Irish *v.* Antioch College (Ill.), 18 N. E. Rep. 768; Hoyt *v.* Pawtucket Inst. for Savings, *supra*.

[7] Hull *v.* King (Minn.), 37 N. W. Rep. 792.

it is a matter to be considered in passing upon the validity of it; and he would be required to refund the amount received before his application could in any case be granted.[1]

XV. *Costs, Expenses, and Proceeds of Sale.*

1923. Mortgagee not entitled to compensation. — A mortgagee with a power of sale is treated as a trustee for sale, and the general rule applicable to trustees, that they shall not profit by the trust, excludes him from claiming compensation for his services in the execution of his power of sale. He is to consider not only his obligation to the purchaser, but his liability to his *cestui que trust* or mortgagor.[2] The same rule applies to a trustee in a trust deed. But the mortgage or trust deed may provide for compensation to the mortgagee or trustee, and then the agreement of the parties will, of course, govern. A provision is frequently inserted in mortgages, allowing the mortgagee on a sale to charge a commission for his services; and in such case it would seem that a charge of the stipulated commission would be allowed in addition to the ordinary expenses and counsel fees.[3] But the mortgagee may charge and be allowed for all proper expenses incurred in the execution of the power of sale, whether the mortgage expressly provide for the payment of such expenses or not. He may charge for expenses of advertising, for auctioneers' fees, and for counsel fees for advice as to the proper execution of the power.[4] Such expenses are properly chargeable under the mortgage, though the attempted sale be discontinued and the property sold in some other way, especially if such sale be discontinued at the request of the debtor or in his interest.[5] A stipulation in a mortgage for an attorney's fee cannot be enforced unless an actual sale be made.[6] The fee cannot be demanded before the sale.[7]

Attorney's fees are not allowed unless provided for in the mortgage; and they are not allowed under a provision for the "ex-

[1] Candee *v.* Burke, 1 Hun (N. Y.), 546; *S. C.* 4 T. & C. 143; Joyner *v.* Farmer, 78 N. C. 196.

[2] § 1606; Sugden on Vendors, 55; Allen *v.* Robbins, 7 R. I. 33.

[3] Lime Rock Bank *v.* Phetteplace, 8 R. I. 56. In this case a commission of five per cent. on the gross proceeds of sale, as stipulated in the mortgage, was allowed in addition to the expenses and counsel fees paid. It was contended that this commission was in the nature of a penalty, which the court should relieve against; but it was allowed as compensation to the mortgagee. Rappanier *v.* Bannon (Md.), 8 Atl. Rep. 555. See § 1606.

[4] Allen *v.* Robbins, *supra.*

[5] Allen *v.* Robbins, *supra.*

[6] Myer *v.* Hart, 40 Mich. 517.

[7] Philips *v.* Bailey, 82 Mo. 639.

penses of sale." This term includes only the ordinary expenses and costs of foreclosure.[1] A provision in a power of sale mortgage for the payment of "all costs of foreclosure, including attorney's fee," includes such a fee upon a sale under the power, but does not authorize an allowance of such a fee for filing a bill of foreclosure.[2]

In Maryland, where the power of sale is executed under the direction of the court, the trustee for sale is allowed a commission of five per cent. But in a case where the owner of the equity of redemption requested an adjournment of the sale, and agreed to pay the usual commissions for sale and the expenses of the adjournment, a claim for commissions in addition to those for the actual sale was disallowed, though the expenses of the ineffectual sale were allowed.[3]

The mere fact that one is named as trustee in a deed of trust raises no implied promise on the part of the beneficiary to pay him for his services.[4]

1924. Reasonable expenses incurred in advertising a sale under a power are always allowed; but when a sale has been enjoined after it was advertised, and the mortgagee or trustee, in anticipation of the action of the court, incurs expense in advertising an adjournment, he is not entitled to have this allowed to him on the dissolution of the injunction; but reasonable attorney's fees for preparing the advertisement may be allowed.[5] If the person who obtains an injunction against a sale allows the advertisement to continue, he is chargeable with the whole expense of the publication.[6] The expenses of an abortive sale must generally be borne by the mortgagor.[7]

1925. If the power provides that the mortgagee may retain all costs and expenses of sale, he may retain a reasonable sum for legal advice respecting it, and also for his own time and trouble.[8] If, however, the sale is not completed, but the adver-

[1] Thomas *v.* Jones (Ala.), 4 So. Rep. 270.

[2] Bynum *v.* Frederick, 81 Ala. 489.

[3] Neptune Ins. Co. *v.* Dorsey, 3 Md. Ch. 334.

[4] Catlin *v.* Glover, 4 Tex. 151.

[5] Marsh *v.* Morton, 75 Ill. 621.

In this case the trustee advertised sales under nine trust deeds securing debts to the amount of $50,000, and $150 was allowed for preparing them.

[6] Collins *v.* Standish, 6 How. (N. Y.) Pr. 493. See opinion of Harris, J., in this case, for a bill of costs, such as is properly allowable in New York.

[7] Sutton *v.* Rawlings, 18 L. J. (N. S.) Exch. 249; *S. C.* 3 Exch. 407; Neptune Ins. Co. *v.* Dorsey, *supra.* See § **1607.**

[8] Varnum *v.* Meserve, 8 Allen (Mass.), 158.

In this case the judge of the Superior Court found to be reasonable in amount

tisement, being imperfect, is withdrawn after a single publication, no attorney's fees or costs can be collected. A tender of the full amount of the debt is good.[1] If after a defective foreclosure the mortgagee for any purpose of his own deems it important to proceed to a new foreclosure for the correction of an error in his own proceedings, he can neither legally nor equitably charge his mortgagor with the expense.[2]

1926. When the bankruptcy court orders the mortgaged property to be sold, and the mortgage debt to be paid out of the proceeds, with leave to the mortgagee to buy at the sale, the costs and expenses are properly payable out of the proceeds of the sale, although these are not sufficient to satisfy the debt, rather than out of the other assets of the bankrupt estate. Such costs do not pertain to the general administration of the bankrupt's estate, but result from the enforcement of a specific lien in large part for the benefit of the mortgagee, the proceeding being substantially one mode of foreclosing the mortgage.[3]

1926 *a*. The proceeds of the sale, after deducting all lawful expenses and charges incurred in making the sale, are applicable in the first instance to the payment of the mortgage debt;[4] and after that is satisfied, the surplus is payable to the subsequent parties in interest according to their respective rights. If the proceeds are sufficient to pay only a part of the mortgage debt, the holder of the mortgage may have a personal remedy against the mortgagor, or his grantee or others, for the deficiency.[5] The payment, not being a voluntary one, does not operate to take the debt out of the operation of the statute of limitations.[6]

The application of the proceeds is, however, subject to the stipulations contained in the deed or mortgage; and a stipulation that the proceeds of a part of the mortgaged property may be applied by the mortgagee is valid and may be carried out.[7]

1926 *b*. Payment of prior liens upon the property. — If the property be subject to taxes, judgment liens, or other incum-

a charge of thirty dollars for legal advice and making the deed, and another of twenty dollars for the mortgagee's own time and trouble in relation to the sale.

[1] Collar *v.* Harrison, 30 Mich. 66.

[2] Clark *v.* Stilson, 36 Mich. 482.

[3] *In re* Ellerhorst, 2 Sawyer, 219. The mortgagee in this case had previously offered to take the property in satisfaction of the debt, but the assignee declined the proposition in the hope of realizing more.

[4] See §§ **1682, 1683.**

[5] See §§ **1709-1721.**

[6] Campbell *v.* Baldwin, 130 Mass. 199.

[7] Newburger *v.* Perkins, 62 Miss. 584.

brances, and the sale is made on the understanding or agreement that the purchaser shall take a clear title, the mortgagee or trustee making the sale must discharge these liens before conveying the title to the purchaser. But ordinarily the purchaser at a sale under a deed of trust or mortgage takes subject to the existing incumbrances upon the property. A trustee under a deed of trust making a sale cannot reimburse the purchaser from the proceeds of sale the amount paid by him for taxes which were a lien upon the property, or the amount paid by him to discharge a judgment lien.[1]

XVI. *The Surplus.*

1927. Generally the mortgage with a power of sale provides for the disposal of the surplus. Different terms are used for this purpose, and they should conform to the disposal that the law would make irrespective of the provision itself;[2] though if this provision be imperfect in not meeting the circumstances of any particular case, or if the direction be different from the disposal that would be made of the surplus under general principles of law, the direction in the deed must yield to the equitable rights of the persons interested. This provision may be very short and comprehensive; and in the best forms of conveyances it is simply that the surplus shall go to the mortgagor, his heirs and assigns.[3] A direction that it be paid to the executors or administrators of the mortgagor is objectionable, because, if the sale takes place after the death of the mortgagor, the land has already passed to his heirs or devisees, and the surplus then belongs to them, notwithstanding such direction; the mortgage cannot alter the character of the surplus as between the personal representatives of the mortgagor and his real representatives. Objection has also been made to the direction that the surplus shall be payable to the mortgagor, his heirs or assigns; because if the sale should be made in his lifetime, but his death should occur before the payment of the surplus, this would then go to his personal representatives, because the land had been converted into personalty at the time of his death. This form is also open to the objection of not being strictly correct in the case of a sale made after the

[1] Tanner *v.* Taussig, 11 Mo. App. 534; Scott *v.* Shy, 53 Mo. 478; Schmidt *v.* Smith, 57 Mo. 135.

[2] See Forms of Mortgages, § 60.

[3] Wright *v.* Rose, 2 S. & S. 323; Bourne *v.* Bourne, 2 Hare, 35; *In re* Smith, 7 Jur. (N. S.) 903.

death of the mortgagor, when he has by his will directed his executor to convert his real estate into personalty. The terms of the mortgage in these cases would have to yield to these circumstances under which they do not meet the equities of the parties. Although the direction that the surplus shall be paid to the mortgagor, his heirs or assigns, does not fully meet these exceptional cases, no harm can come from this, because the surplus is in all cases bound by the actual rights and equities of the parties interested. No form of words can be used which will in every case fully point out to the mortgagee the persons to whom he is to pay the surplus; and that form which is correct generally, and is the most concise, is the best.[1] The mortgagee cannot be relieved of the responsibility of determining who are the persons entitled according to law, unless in cases of doubt he refers the determination of this question to the courts. Complications may arise which may make such a reference the only safe course; but usually there is no difficulty in determining who are entitled under the law, and the direction to pay to the heirs or assigns of the mortgagor affords as much aid as any other, however elaborate.

Whether the surplus be the whole sum bid for the property, less the amount of the mortgage with the costs and expenses, depends upon the terms of sale. If the title put up and sold be the entire estate without deducting prior incumbrances, the proceeds are primarily applicable to the payment of such prior incumbrances so far as needed for that purpose. But if only the mortgage title be sold, or if that title be sold expressly subject to prior incumbrances, the purchaser must account to the mortgagor for the surplus of the purchase money, deducting only the amount of the mortgage with costs and expenses.[2] Thus, if land is sold subject to outstanding tax titles, the mortgagee, to whom the sale is made, is not entitled to deduct from the proceeds of the sale money subsequently paid by him to redeem such tax titles; and evidence that it was understood and agreed, prior to the sale, between the mortgagee and the auctioneer, that the amount of the outstanding tax titles was to be deducted from the bid of the mortgagee, is inadmissible.[3]

[1] The statutory power of sale in England directs the payment of the surplus to the mortgagor, his heirs, executors, administrators, or assigns, according to their respective rights and interests therein.

[2] Morton *v.* Hall, 118 Mass. 511; Alden *v.* Wilkins, 117 Mass. 216; O'Connell *v.* Kelly, 114 Mass. 97; Story *v.* Hamilton, 20 Hun (N. Y.), 133. See § **1853**.

[3] Skilton *v.* Roberts, 129 Mass. 306.

1928. If the surplus in the hands of the mortgagee remains unproductive while adverse claims are made upon him by different persons, he is not chargeable with interest pending the determination of their rights.[1] It may happen that on account of adverse claims, or on account of the absence or death of the mortgagor or other person entitled to the surplus, that much time may elapse before payment of the surplus can be made, in which case it is advisable either to pay the money into court, or to safely invest it as a trust fund pending the settlement of the question to whom it shall be paid, or the appearance of the rightful claimant.

1929. The surplus proceeds must be applied according to the title of the respective parties in the property itself. If the sale be under the first mortgage, the holders of the second mortgage are first entitled, and then the next subsequent mortgagees in their order, and last, the mortgagor or owner of the equity of redemption. The purchaser of the equity of redemption stands in place of the mortgagor in respect to this right.[2] But the consent of a second mortgagee, that the surplus arising from a sale under the first mortgage may be paid to a purchaser of the equity of redemption, will not authorize such payment as against the mortgagor, without discharging the debt secured by the second mortgage; because the mortgagor is entitled to have the mortgage debts on which he is personably liable satisfied before anything is paid over to one who purchased only the equity to redeem both mortgages.[3]

The right to the surplus passes to the grantee of the mortgagor by a conveyance of the equity of redemption,[4] or by a mortgage of it. But if the lien of a subsequent mortgagee is not affected by the sale, by reason of any irregularity in it, such as a want of notice to him of the proceeding, when this was required by the power or by statute, he has no claim upon the surplus. His claim is in such case upon the land.[5]

1930. Notice of claims to the surplus money must be given to the mortgagee, or he must have actual notice of the incum-

[1] Mathison *v.* Clark, 25 L. J. (Ch.) N. S. 29; *S. C.* 4 W. R. 30.

[2] § **1688**; Cook *v.* Basley, 123 Mass. 396; Buttrick *v.* Wentworth, 6 Allen (Mass.), 79; Foster *v.* Potter, 37 Mo. 525, 534; Reid *v.* Mullins, 43 Mo. 306; Ballinger *v.* Bourland, 87 Ill. 513; Brown *v.* Crookston Ag. Asso. 34 Min. 545; 26 N. W. Rep. 907; Fuller *v.* Langum (Minn.), 33 N. W. Rep. 122.

[3] Andrews *v.* Fiske, 101 Mass. 422.

[4] Buttrick *v.* Wentworth, *supra.*

[5] Winslow *v.* McCall, 32 Barb. (N. Y.) 241.

brances on which such claims may be founded, or he will not be responsible for not applying the surplus towards the payment of them.[1]

1931. A surplus arising on the sale of real estate under a power after the death of the mortgagor belongs, under the rule in England,[2] adopted also in New York,[3] and other states,[4] to his heirs or devisees, and not to his administrator, who cannot maintain an action to recover it, although the mortgage itself provides that the surplus shall be paid to the mortgagor, his executor, or administrator. The heirs or devisees are also entitled to the profits of the surplus in the mortgagee's hands until legal measures are taken by the administrator of the estate to apply the surplus to the payment of the debts of the mortgagor.[5] In support of this view, it is urged that the provision in the mortgage for the payment of the surplus should be construed that the payment is to be made to the executor or administrator whenever it might have been collected by the mortgagor, as, for example, when the land is sold in his lifetime. Moreover, it is to be observed that in New York the equity of redemption is the legal estate, and the mortgage only a lien.

In Massachusetts, on the other hand, it is held that the action in such case should be maintained by the administrator, who will, however, hold the money when collected in trust for the persons who would have been entitled to the land if no sale had been made.[6] All the cases recognize the doctrine, that the surplus is

[1] M'Lean *v.* Lafayette Bank, 4 McLean, 430.

[2] See § **1695**; Wright *v.* Rose, 2 S. & S. 323. "If the estate had been sold by the mortgagee in the lifetime of the mortgagor, then the surplus moneys would have been personal estate of the mortgagor, and the plaintiffs would have been entitled. But the estate being unsold at the death of the mortgagor, the equity of redemption descended to his heir, and he is now entitled to the surplus produce." Per the Vice-Chancellor. See, also, Polley *v.* Seymour, 2 Young & C. 708, 721; Bourne *v.* Bourne, 2 Hare, 35, 39.

[3] Dunning *v.* Ocean Nat. Bank, 61 N. Y. 497; Sweezy *v.* Thayer, 1 Duer (N. Y.), 286.

[4] Chaffee *v.* Franklin, 11 R. I. 578; Shaw *v.* Hoadley, 8 Blackf. (Ind.) 165.

[5] Allen *v.* Allen, 12 R. I. 301. It was further held in this case that the heirs and devisees were entitled to receive the surplus on giving proper security to repay it, or so much of it as might be needed to pay the debts of the deceased; and that, if such security were not given, the surplus should be paid into court, and there administered as the probate court would administer it.

[6] Varnum *v.* Meserve, 8 Allen (Mass.), 158. The surplus in such case belongs to the executor, although the mortgagor by will devised the land to others; and he will hold such surplus, first, to the use of the widow having a paramount right of homestead; second, for the payment of debts; and third, to the uses of the will.

In Michigan it is held that the surplus is personal estate, and consequently that

equitable real estate, and should go to the persons who would be entitled to the equity of redemption. They differ as to the mode in which the parties in interest shall obtain their rights, rather than as to the rights themselves. One reason why the administrator should be entitled to recover is, that if the equity of redemption had not been sold it would have remained subject to the debts of the deceased, and might have been sold under a license to the administrator, if required for that purpose; and therefore the administrator should take the surplus and hold it until it is certain that it will not be required for the payment of debts. Moreover, there is force in the fact that the right of the mortgagor's personal representative to recover is direct under the contract.

1932. In case of the insolvency or bankruptcy of the mortgagor, a provision that the surplus, after satisfying the debt, shall be paid to the mortgagor without naming his assigns, does not create any trust for his benefit, but the surplus will go to his assignee in bankruptcy.[1]

When a mortgage is foreclosed after the death of the mortgagor, and his estate is insolvent, the mortgagee cannot retain a surplus in his hands and apply it to the payment of a simple contract debt due him from the mortgagor, as this would give him a preference over other creditors, but he must hand it over to the personal representatives of the deceased. The mortgagee is merely a trustee of the surplus.[2]

1933. Dower in surplus. — By the foreclosure sale the mortgagor's right of redemption is converted into a claim upon the surplus money in the mortgagee's hands. It is personalty, and belongs to those who are entitled to his personal estate. The wife of the owner of the estate, subject to a mortgage valid against her, has no claim to any part of the surplus proceeds of a foreclosure sale under the mortgage, as against her husband or his assignees in bankruptcy.[3] The sale is as effectual in barring all claim or possibility of dower in the property as if the foreclosure had been by entry for breach of condition and lapse of time. The death of the husband after the sale, but before the distribution of the money, would not avail to endow the widow

the personal representatives of the owner of the equity should be made parties to a petition for the surplus. Smith *v.* Smith, 13 Mich. 258.

[1] Calloway *v.* People's Bank of Bellefontaine, 54 Ga. 441, 450.

[2] Talbot *v.* Frere, L. R. 9 Ch. D. 568.

[3] §§ **1693, 1694**; Newhall *v.* Lynn Five Cents Savings Bank, 101 Mass. 428.

of the surplus, as the rights of all parties are fixed at the time of the sale. If the sale take place after the death of the mortgagor, then his widow is entitled to dower in the surplus.[1]

Some courts have held that if there be a surplus after a foreclosure sale, the wife's inchoate right of dower will be protected either by investing one third of the amount to await the perfection or cessation of such right, or by calculating the present value of her chance of surviving her husband, and paying to her at once such sum.[2] But this is an exceptional holding.

1934. When the equity has been sold under execution or attached. — The mortgage usually provides that the surplus, after payment of the mortgage debt and expenses, shall be paid to the mortgagor or his assigns; and in such case the surplus belongs to the person who is at the time of the sale the owner of the equity of redemption. If the equity of redemption has been sold on execution before a sale of the land under a power in the mortgage, the surplus then belongs to the purchaser at the execution sale, for the sale and conveyance on execution constitute such purchaser the owner of the equity of redemption. But if the equity of redemption be attached, and pending the suit the mortgagee sells under such a power in the mortgage, and judgment and execution follow, and the execution be levied by a sale of the land, the levy is a nullity so far as respects the title to the land; and as respects the surplus in the hands of the mortgagee of the proceeds of the sale under the mortgage, it gives the purchaser no right or title; and he cannot maintain either an action at law for money had and received, or a bill in equity to recover such surplus, if brought or filed more than thirty days after judgment was recovered.[3]

Whether, by any form of process at law or in equity, brought within the period after judgment during which the attachment continues a lien, the creditor could reach and apply to his claim the surplus in the mortgagee's hands, is a question which was not decided in the case last cited, but was determined in a case which arose in the same court soon afterwards; and it was there decided that when land subject to a mortgage is attached on mesne process, and before judgment is recovered the land is sold, under a power of sale in the mortgage, for more than enough to pay the

[1] Chaffee *v.* Franklin, 11 R. I. 578.

[2] § 1694; De Wolf *v.* Murphy, 11 R. I. 630.

[3] Gardner *v.* Barnes, 106 Mass. 505.

debt and expenses of sale, the attaching creditor may, by a bill in equity brought within thirty days after judgment in the action in which the attachment was made, enforce his lien against the surplus.[1]

If at the time of the sale under a trust deed the property has been sold under a junior judgment, and the title has become absolute in the purchaser by the expiration of the time allowed for redemption, so that he has received a deed of the property, or is entitled to one, he is then entitled to receive the whole of any surplus there may be after discharging the debt secured by the trust deed and the expenses; but if the land has been sold under execution, and the time for redemption has not expired, and the purchaser is not entitled at the time of the sale under the trust deed to a deed conferring the title upon him, he then has only a lien upon the surplus, and is entitled to only so much of it as will satisfy the amount of his bid and the interest thereon allowed by statute. In the latter case the grantor in the trust deed is entitled to the remainder after satisfying the judgment lien, although his right to redeem has expired, but the purchaser's right has not become absolute by the expiration of the time within which there can be a redemption from him by any one else; as where twelve months are allowed the debtor for redemption, and three months more for redemption by a creditor, and the sale under the trust deed takes place during these three months.[2]

1935. Judgment lien. — The sale cuts off all right of redemption, and prevents any levy of execution upon the land by virtue of the attachment. The land is turned into money, which is to be applied in the first instance to the payment of the debt and expenses of the mortgagee, and any surplus to the same persons the land belonged to before the sale. Their respective rights in the fund are not affected by the sale; and the court will apply the money according to the rights of the parties as they existed before the real estate was turned into money.[3] If there be a

[1] Wiggin *v.* Heywood, 118 Mass. 514; Judge *v.* Herbert, 124 Mass. 330; De Wolf *v.* Murphy, 11 R. I. 630

[2] Hart *v.* Wingate, 83 Ill. 282. A previous judgment in this case, under the name of Solt *v.* Wingarte, 8 Chicago L. N. 179; *S. C.* 2 N. Y. Weekly Dig. 98, which was clearly contrary to principle and authority, was withdrawn. In support of the text see, also, Snyder *v.* Stafford, 11 Paige (N. Y.), 71.

[3] Astor *v.* Miller, 2 Paige (N. Y.), 68; Fry's Appeal, 76 Pa. St. 82; Douglass's Appeal, 48 Pa. St. 223; De Wolf *v.* Murphy, *supra;* Bartlett *v.* Gale, 4 Paige (N. Y.), 503; Barber *v.* Cary, 11 Barb. (N. Y.) 549; Brown *v.* Crookston Ag. Asso. 34 Minn. 545.

judgment lien upon the equity of redemption, this must be satisfied before the owner can claim anything.[1]

1936. Where the payment of a mortgage debt has been charged upon a portion of the mortgaged premises, by reason that the mortgagor has given a warranty deed of the other portion, the charge in equity attaches to the surplus arising from the sale of the land by a prior mortgagee.[2]

If there are sureties upon part of the debt secured by the mortgage, upon a sale of the property the mortgagee becomes a trustee for them to the amount of the funds provided for their indemnity, and must see that their just proportion of the proceeds is applied to the discharge of the debt upon which they are bound.[3]

1937. When property is sold under a mortgage or deed of trust to satisfy one instalment of the debt before the others have matured, and there is no provision that the whole debt shall be due and payable upon a default upon any part of it, the trustee holds any surplus there may be, after satisfying the expenses and the part of the debt then due, subject to the same lien as the property was.[4] The mortgagor has no claim to it. When the mortgage expressly or impliedly provides that the whole debt shall become due upon any default, either the mortgagee or his assignee is authorized to exercise the option to declare due all the notes secured by the mortgage, and to advertise and sell the premises in payment of the whole debt.[5] The trustee in a deed of trust has the same right, and is not bound to give any notice to the debtor of his election to treat the whole debt as due.[6]

The mortgage lien is of course exhausted by a sale of the whole estate for the payment of an instalment only of the debt. The same land cannot be sold again to satisfy a subsequent instalment. The entire title and interest passes by the first sale.[7] If, however, the foreclosure sale is defeated before it has become complete by the owner's redeeming within the time allowed by statute, the

[1] Eddy *v.* Smith, 13 Wend. (N. Y.) 488; Hall *v.* Gould, 79 Ill. 16. See §§ **1687, 1688.**

[2] Beard *v.* Fitzgerald, 105 Mass. 134.

[3] § **1706**; Fielder *v.* Varner, 45 Ala. 429.

[4] §§ **1699–1703**; Huffard *v.* Gottberg, 54 Mo. 271; Standish *v.* Vosberg, 27 Minn. 175; Fowler *v.* Johnson, 26 Minn. 338.

[5] Heath *v.* Hall, 60 Ill. 344; Fryar *v.* Fryar, 62 Miss. 205.

[6] Princeton Loan & Trust Co. *v.* Munson, 60 Ill. 371.

[7] Fowler *v.* Johnson, *supra;* Standish *v.* Vosburg, *supra;* Brown *v.* Brown, 47 Mich. 385.

same land may be sold again for the satisfaction of the other instalments of the mortgage debt.[1]

1938. Payment of whole debt on a sale for an instalment. — It is not necessary, in order to authorize a sale under a power and the payment of the whole debt upon default in the payment of an instalment of the debt, before the whole of it has matured, that there should be an express provision that the whole may in such event become due and be collected.[2] Although it is true that a power to sell the property in the event of any default, and out of the proceeds to retain the principal and interest then due, while it authorizes the sale of the entire property, does not make the entire debt due and collectible upon the first default; yet if the property be incapable of division without injury, and is sold upon the first default, and yields a fund sufficient to pay the whole debt, it may be so applied at once, so as to stop interest and extinguish the whole liability.

Generally the power of sale authorizes the mortgagee, upon making a sale, to retain from the proceeds the whole amount of his demand, whether it be due or not. In several states, as in Michigan, Minnesota, New York, and Wisconsin, the statutes regulating sales under powers provide that, if the premises consist of distinct parcels or lots, no more shall be sold than is sufficient to satisfy the amount due on the mortgage with interest and costs.[3] When it is proper to sell the whole mortgaged premises together, the whole debt may be retained from the proceeds. These statutes do not contemplate a sale subject to instalments not due at the time of the sale.[4] The powers are never drawn with a view

[1] Standish *v.* Vosburg, 27 Minn. 175.

[2] Olcott *v.* Bynum, 17 Wall. 44.

The power was as follows: "That if default shall be made in the payment of the said sum of money, or the interest that may grow due thereon, or of any part thereof, that then, and upon failure of the grantor to pay the first or any subsequent instalment, as hereinbefore specified, it shall be lawful for the trustee to enter upon all and singular the premises hereby granted, and to sell and dispose of the same, and all benefit and equity of redemption, etc., and to make and deliver to the purchaser or purchasers thereof a good and sufficient deed for the same, in fee simple, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertising and sale of the same premises, rendering the overplus of the purchase money, if any there shall be, unto the said Hovey," the grantor. Mr. Justice Swayne said, that the mortgagee in this case having applied the fund as a court of equity would have applied it, there was no ground for complaint.

[3] See Statutes, §§ 1340, 1343, 1351, 1364.

[4] Cox *v.* Wheeler, 7 Paige (N. Y.), 248;

to such a proceeding. In this respect the effect of the sale in the payment of the debt is quite different from that of a foreclosure sale in equity, where provision may be readily made for further sales to meet future instalments, or for the care of the money received in excess of the amounts due, and the payment of the instalments as they mature. Except under the statute, there can be no sale of the mortgaged estate to pay the amount already due, subject to the future instalments. The mortgage is extinguished by such sale, though relief might be had in equity against the purchaser.

1939. If a sale is made when only part of the mortgage notes have matured, under a notice of a sale to be made subject to other notes specified, the presumption is conclusive that the land sold for the amount of the unpaid notes less than it would otherwise have done. The mortgagor may then insist that payment of such notes shall be made out of the land upon which they have become, by the mortgage and sale, an express charge. Therefore there can be no action against him for these notes. The fact that the mortgagees became purchasers under the foreclosure sale places them in no better position, in regard to collecting the notes of the mortgagor, than if a third party had purchased subject to the notes. If the mortgagor should be compelled to pay the notes he would be subrogated to the mortgage security, and might proceed to collect the amount of these notes out of the land. To prevent circuity of action, a suit upon the notes against the mortgagor is not allowed.[1]

If a trustee under a deed of trust made to secure three notes sells for the payment of two of the notes, and the holder of these notes, bidding the amount of them, becomes the purchaser, the other note being held by a third party, the purchaser in effect buys subject to the right of such third party to enforce his note against the property; but neither the purchaser nor the trustee is personally liable to such third party. But if the purchaser afterwards sells the land to an innocent purchaser for value, the purchaser at the trustee's sale becomes personally liable to the holder of the other note.[2]

As already noticed, it is a settled rule of law in several states

Jencks *v.* Alexander, 11 Ib. 619; Bunce *v.* Reed, 16 Barb. (N. Y.) 347; Barber *v.* Cary, 11 Ib. 549.

[1] Shermer *v.* Merrill, 33 Mich. 284. See § 1459.

[2] Wicks *v.* Caruthers, 13 Lea (Tenn.), 353.

that where a mortgage or deed of trust has been given to secure the payment of several notes, which become due at different times, the notes have priority of lien in the order in which they become due and payable.[1] Accordingly, where the first note falling due of a series of notes secured by a trust deed belonged to one party, and the other notes to another, and the trustee, at the request of the holder of the note first due, advertised the property for sale to pay his note, and afterwards, at the request of the holder of the other notes, advertised and sold the property at an earlier day to the latter, and then, upon the day of sale under the first advertisement, sold the property again to the holder of the first maturing note, it was held that although the purchaser at the first sale took the legal title, a court of equity would set aside the first sale and order another, from the proceeds of which the several notes should be paid according to the order of their maturity.[2]

1940. The rights of different claimants of the surplus money may be determined in suits brought by them against the mortgagee for money had and received;[3] or he may himself by bill of interpleader bring the claimants into court and ask for its direction to whom to pay it. He is in some sort a trustee of the money in his hands for those entitled to it, and should retain it until the rights of the parties are determined.[4]

If a second mortgagee, instead of selling the title mortgaged to him, sells with the assent of the prior mortgagee the entire title in the land, the surplus remaining after paying the first and second mortgages belongs to the next subsequent parties in interest, and a third mortgagee may maintain an action for money had and received. The fact that the sale was not made subject to the first mortgage does not affect the rights of the third mortgagee.[5]

Suit for the surplus by the person entitled to it is at law and not in equity.[6] Assumpsit lies against the mortgagee for the sur-

[1] § **1699**; Flower *v.* Elwood, 66 Ill. 438; Herrington *v.* McCollum, 73 Ill. 476.

[2] Koester *v.* Burke, 81 Ill. 436, 438.

[3] Cope *v.* Wheeler, 41 N. Y. 303; Matthews *v.* Duryee, 45 Barb. (N. Y.) 69; Bevier *v.* Schoonmaker, 29 How. (N. Y.) Pr. 411; Webster *v.* Singley, 53 Ala. 208; Cook *v.* Basley, 123 Mass. 396. As to proceedings in **New York**, to determine to whom the surplus belongs, see Kirby *v.* Fitzgerald, 31 N. Y. 417; Matthews *v.* Duryee, *supra.* But now provision is made by statute, which see, § **1751**.

[4] Bleeker *v.* Graham, 2 Edw. (N. Y.) 647; People *v.* Ulster Com. Pleas, 18 Wend. (N. Y.) 628; Bevier *v.* Schoonmaker, *supra;* Hayes *v.* Woods, 72 Ala. 92, 95; Yarborough *v.* Wise, 5 Ala. 292.

[5] Cook *v.* Basley, *supra.*

[6] Ballinger *v.* Bourland, 87 Ill. 513.

plus arising from the sale, unless his obligation to pay it is in the form of a covenant or agreement under seal.[1] Where by statute the mortgagee is authorized to pay the surplus into court, or to the sheriff or other officer who makes the sale, such payment is a good defence to a suit brought against him to recover the surplus.[2]

If a *cestui que trust* upon a sale under a trust deed bids more than enough to pay the debt secured, he is legally bound for the balance of his bid, and upon his decease the liability devolves upon his personal estate, and should be enforced by suit against his personal representatives. Remedy cannot be had by bill in equity against his heirs, except upon an allegation of the want or sufficiency of the personal estate.[3]

It has been held that an agreement of the mortgagee to pay the surplus to the mortgagor does not extend to subsequent incumbrancers, so as to give them any right of action for a surplus not actually received by the mortgagee, but allowed by him to be retained by the purchaser under a claim of his own upon the property. The court say, that although a trust would in such case arise in favor of the mortgagor, yet he cannot be regarded as a trustee for subsequent incumbrancers until the surplus money has actually been received by him.[4] The purchaser, however, would be liable to the incumbrancer entitled to the surplus.

[1] Stoever *v.* Stoever, 9 Serg. & R. (Pa.) 434; Cope *v.* Wheeler, 41 N. Y. 303; Hayes *v.* Woods, 72 Ala. 92, 95.

[2] Bailey *v.* Merritt, 7 Minn. 159.

[3] Laughlin *v.* Heer, 89 Ill. 119.

[4] Russell *v.* Duflon, 4 Lans. (N. Y.) 399.

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